



REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

OCTOBER, 1912, to MARCH, 1913.

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1914

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HON. EDWARD T. BURKE, Judge.

HON. EVAN B. GOSS, Judge.

HON. ANDREW A. BRUCE, Judge.

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CONSTITUTION OF NORTH DAKOTA.

SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

COUNTY COURTS.

In general, the county courts (so designated by the Constitution) are the same as the probate courts of other states.

CONSTITUTIONAL PROVISIONS.

SEC. 110. There shall be established in each county a county court, which shall be a court of record open at all times and holden by one judge, elected by the electors of the county, and whose term of office shall be two years.

SEC. 111. The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law; provided, that whenever the voters of any county having a population of two thousand or over shall decide by a majority vote that they desire the jurisdiction of said court increased above that limited by this Constitution, then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars, and in all criminal actions below the grade of felony, and in case it is decided by the voters of any county to so increase the jurisdiction of said county court, the jurisdiction in cases of misdemeanors arising under state laws which may have been conferred upon police magistrates shall cease. The qualifications of the judge of the county court in counties where the jurisdiction of said court shall have been increased shall be the same as those of the district judge, except that he shall be a resident of the county at the time of his election, and said county judge shall receive such salary for his services as may be provided by law. In case the voters of any county decide to increase the

jurisdiction of said county courts, then such jurisdiction as thus increased shall remain until otherwise provided by law.

STATUTORY PROVISIONS.

Increased Jurisdiction: Procedure. The rules of practice obtaining in county courts having increased jurisdiction are substantially the same as in the district courts of the state.

Appeals. Appeals from the decisions and judgments of such county courts may be taken direct to the supreme court.

The following named counties now have increased jurisdiction: Benson; Bowman; Cass; Dickey; La Moure; Ransom; Renville; Stutsman; Ward; Wells.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

SMITH v. WILLOUGHBY.

(138 N. W. 7.)

Replevin — judgment in alternative.

1. In a claim and delivery proceeding brought under §§ 7075 and 7036, Rev. Codes 1905, and in which the defendant is shown to be entitled to a return of the property seized, and where, although it is shown that the plaintiff offered the said property for sale at public auction before the trial, it is also shown that he himself purchased the greater part thereof at such sale, the judgment should be in the alternative for a return of the property or for the value thereof, and a judgment for the value only is erroneous. Under such a state of facts, it cannot be said that the proof discloses "that a return cannot be had," which must be shown under the statute before a judgment for the value alone can be rendered. In such a case, also, the verdict should specifically describe the several articles of property and the value of each of said articles.

Replevin by bailee — judgment.

2. Where chattels are wrongfully taken from a bailee, but are afterwards, and before suit by such bailee, replevied from the wrongdoer and returned to the possession of the true owners or bailors, such bailee in a suit against such wrongdoer can merely recover damages based upon the injury to his special interest and cannot recover for the full value of the articles taken from him. The verdict, also, and judgment, should specifically describe the articles for
24 N. D.—1.

which a recovery is allowed, or a return of which is ordered, and the value of each of the said articles.

Replevin — conforming judgment to facts.

3. Where, however, there is no dispute in the evidence as to the value of the property not so held as a bailment, but wrongfully disposed of or still held by the plaintiff, and no point whatever is made on the trial as to the value of the bailed property, but of the property owned by the defendant in the claim and delivery proceeding, and wrongfully sold or withheld by the plaintiff alone, a new trial need not necessarily be ordered, but the judgment may be made to conform to the facts.

Replevin — judgment in alternative — description of property and value.

4. In such proceeding a judgment in the alternative for the return of the property or for the value thereof, and for damages for the detention thereof, should specifically describe the items of property and the value thereof. Such specification of the value of each article, however, need not be made in the absence of a demand therefor on the trial, and in the absence of such demand a verdict and judgment in the aggregate can be given.

Opinion filed October 11, 1912.

Appeal by plaintiff from a judgment of the District Court for Foster County, *Burke, J.*, in defendant's favor in an action to recover possession of certain property.

Reversed on condition.

Statement by *BRUCE, J.* The plaintiff and appellant, in a claim and delivery proceeding under the statute, seized certain personal property of the defendant upon which he claimed to hold certain chattel mortgages. The plaintiff filed a complaint in the action, setting up his alleged special interest under said chattel mortgages, describing the property to be seized, and demanding judgment for immediate possession. Defendant answered by pleading payment and certain other defenses, and in his turn prayed "for judgment against said plaintiff for the immediate return and possession of the property described in said complaint, or the sum of \$5,000, the value thereof, in case a delivery cannot be had, and \$1,000 damages for the detention thereof, and costs." The verdict was: "We, the jury, find that, at the time of the commencement of this action, the defendant was entitled to the possession of said property, and that its value was \$1,878." On this

verdict the trial court entered judgment "that the defendant have and be awarded, and the defendant is awarded, judgment against the plaintiff in the above-entitled action for the sum of \$1,878, the same being the value of the property so taken by the plaintiff and not returned to the said defendant in the above-entitled action." From this judgment this appeal was taken. The evidence showed that after the seizure by the plaintiff and before the trial the said plaintiff had sold, at public auction, the machinery and twenty-one or twenty-two horses seized by him, and that twenty-one more of said horses had been replevied by the wife and children of the defendant, and that at the time of the seizure of such property by the plaintiff, they had belonged to such wife and children, though they were in the barn of the defendant. It also showed that after such sale, plaintiff settled with other parties for five more of the horses. Nearly all of the property sold at the public auction, however, was bid in by the plaintiff, himself.

Guy C. H. Corliss, for appellant.

Plaintiff should have the right to return the property, and not be compelled to pay for it, and a judgment simply for the value of the property is in violation of his statutory rights. *Singer Mfg. v. Dunham*, 33 Neb. 686, 50 N. W. 1122; *Manker v. Sine*, 35 Neb. 746, 53 N. W. 734; *Martin v. Foltz*, 54 Neb. 162, 74 N. W. 418; *Baxter v. Berg*, 88 Wis. 399, 60 N. W. 711; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Hooker v. Hammill*, 7 Neb. 231; *Lee v. Hastings*, 93 Neb. 508, 14 N. W. 476; *Dwight v. Enos*, 9 N. Y. 470; *Hall v. Jenness*, 6 Kan. 356; *Legere v. Stewart*, 17 Colo. App. 472, 68 Pac. 1059; *Smith v. Coolbaugh*, 19 Wis. 106; *McNamara v. Eisenleff*, 14 Abb. Pr. N. S. 25; *Kates v. Thomas*, 14 Minn. 460, Gil. 343; *Glann v. Younglove*, 27 Barb. 480; *Seaman v. Luce*, 23 Barb. 248; *Robbins v. Slattery*, — S. C. —, 9 S. E. 510; *Washburn v. Huntington*, 78 Cal. 573, 21 Pac. 305; *Etchepare v. Aguirre*, 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668; *Hynes v. Barnes*, 30 Mont. 25, 75 Pac. 523; *French v. Ginsburg*, 57 Minn. 264, 59 N. W. 189.

Replevin of this property by the wife and children is a complete answer to a claim by defendant that the same property should be returned to him also. *Coen v. Watkins*, 62 Mo. App. 502; *Mohr v.*

Langan, 162 Mo. 474, 85 Am. St. Rep. 507, 63 S. W. 409; Brown v. Webster, 4 N. H. 500; Bath v. Miller, 53 Me. 316.

A verdict which does not in some way describe the property that defendant is entitled to the return of is defective, and no judgment can be rendered thereon. 34 Cyc. 1530; Guille v. Wong Fook, 13 Or. 577, 11 Pac. 277; Ford v. Ford, 3 Wis. 399.

W. O. Lowden, for respondent.

The facts proven and shown by the abstract warrant the judgment entered in this action. Larson v. Hanson, 21 N. D. 411, 131 N. W. 231.

The testimony conclusively showing that the plaintiff had disposed of the property and two years thereafter having elapsed before the trial and it not appearing that they could be returned to like condition as when seized, the court rightfully entered the judgment.

Park v. Robinson, 15 S. D. 551, 91 N. W. 344; Claudius v. Aguirre, 89 Cal. 501, 26 Pac. 1077; Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

BRUCE, J. (after stating the facts as above). Plaintiff and appellant contends as grounds for reversal of the judgment herein, (1) that under the provisions of our statute, §§ 7075 and 7036, Rev. Codes 1905, a plaintiff who has wrongfully taken property in claim and delivery proceedings has an absolute right to the judgment against him being in the alternative for the return of the property, or its value in case a return cannot be had, and that no such alternative was given in this case; (2) that the verdict nowhere describes the personal property for which the compensation is required to be made, but merely speaks of it as "said property;" (3) even if the words "said property" can be regarded as a description of the property described in the complaint, plaintiff and appellant contends that such verdict is unwarranted and unsustained by the evidence, as the testimony shows that at least twenty-one of the horses described in the complaint did not belong to the defendant at all, but to his wife and children, and were replevied by them, and, as far as the evidence discloses, are now in their possession.

There appears to be some doubt in the authorities as to whether, in an action between the original parties, and where the property which is put up at public auction or otherwise sold is conveyed to a

third party, the judgment should be in the alternative. See *Larson v. Hanson*, 21 N. D. 411, 131 N. W. 231; *Sherman v. Clark*, 24 Minn. 37; *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463; *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344; *McNamara v. Eisenleff*, 14 Abb. Pr. N. S. 25. There can be no doubt, however, that a judgment in the alternative should have been rendered in the case at bar. Although the plaintiff sold at public auction the horses and machinery which were not replevied from him, the proof is uncontradicted that he himself was the purchaser of by far the greater part thereof, and the presumption, in the absence of proof to the contrary of course, must be that he was in the possession thereof at the time of the trial. The statutes, §§ 7075 and 7036 of the Code of 1905, require a judgment to be in the alternative except when it is shown that a delivery cannot be had, and the proof in the case at bar falls very far short of showing such impossibility of delivery.

The general rule seems to be that "where several articles are embraced in an action of replevin, the judgment following the verdict should show the separate value of each article so that by the return of any one of more articles the judgment may be satisfied *pro tanto*." 18 Enc. Pl. & Pr. 602. The rule, it is said, is for the purpose of enabling the court by its judgment to afford the party entitled to the property a complete remedy in case the property cannot be obtained on execution, and is also evidently for the purpose of enabling the wrongdoer to return what he can of the property and reduce the judgment *pro tanto* by a return of a portion thereof. This rule necessarily involves a finding by the jury of the value of each specific article. It is argued, indeed, that if there is no such finding and judgment, and a portion only is or can be returned, another lawsuit may be necessary in order to decide the value of, or the loss to the owner on account of the failure to return, the missing articles. It does not seem, however, that under our peculiar statute such specific valuation is necessary, except where it is demanded upon the trial, and the jury are instructed to ascertain the same. Sec. 7036 of the Revised Codes of 1905 provides, among other things, that, "3. In case they find against the plaintiff, and the property has been delivered to him, and the defendant in his answer claims a return of the property, they must find the value thereof, or of the defendant's interest therein if less than its full value

at the time of the taking, and they must also assess the damages, if any are claimed in the answer, which the defendant has sustained by reason of the taking and detention of such property. . . . Whenever the jury *are so instructed*, they must find the value of specific portions of the property in controversy, or of the interest of either party therein if less than its full value at the time of the taking, and shall also assess the damages, if any are claimed by the party in whose favor they find sustained by reason of the taking and detention of such property." Section 7075 provides that "in an action to recover the possession of personal property, the judgment for the plaintiff may be for the possession or for the recovery of possession, or the value thereof in case a delivery *cannot be had*, and for damages for the taking and detention thereof. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof *in case a return cannot be had*, and damages for the taking and detention thereof." These statutes seem to have had their origin in §§ 5063 and 5099 of the Compiled Laws of the territory of Dakota, of 1887, and have been considered by the supreme court of South Dakota in the case of *First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646. In this case it was held that a verdict which found the value of the property in the aggregate was not erroneous *in the absence of an instruction to find the value of each item separately, or demand therefor*. See also *Stevenson v. Lord*, 15 Colo. 131, 25 Pac. 313; *Caldwell v. Bruggerman*, 4 Minn. 270, Gil. 190. There was no such demand or instruction in the case at bar, and it would seem, therefore, that there was no error in returning the value in the aggregate.

The second and third propositions raised by the appellant are technically correct, but by no means fundamental. It is undisputed that, even at the time of the seizure by the plaintiff, a number of the horses, though in the barn of the defendant and presumably in his custody and possession as a bailee, belonged in fact to his wife and children, and that they were afterwards, and before the trial, replevied by such owners from the plaintiff. In these horses the defendant had but a special or qualified interest, and since the bailors or owners have now recovered the possession thereof, and the defendant is no longer responsible therefor, the damages in relation thereto can be based upon

that special interest, and upon that special interest alone. 18 Enc. Pl. & Pr. 601. If, therefore, the words "said property" as found in the verdict necessarily include these horses, the verdict is erroneous. The same is also true of the five horses which the evidence shows were seized by the plaintiff and bid in by him at the sheriff's sale, but which were afterwards settled for by him with the true owners, the son of the defendant and Horn & Anderson. So, too, the general rule seems to be that a verdict and judgment in such a case should specifically describe the property which is ordered to be returned or for which compensation is required to be made. See 34 Cyc. 1530; *Guille v. Wong Fook*, 13 Or. 577, 11 Pac. 277.

If, indeed, the evidence in this case was not exactly as it is, we would be absolutely compelled to order a new trial. In it, however, there is no dispute as to the value of the property and horses not so held by the defendant as a bailee, and for the full value of which recovery can be had, and no point whatever is made as to the value of the bailed property, but of the property and horses owned by the defendant in the claim and delivery proceeding, and wrongfully seized and sold by the plaintiff, alone. The evidence, in fact, with one minor exception, relates almost entirely to the value of such property, and there is no controversy in relation thereto. The only difficulty which is to be found in the case, therefore, lies in the fact that the value as found by the jury is not supported by the evidence. The jury did not find the value of these specific articles, but the value in the aggregate, and that value they set at \$1,878. There is, as we have said, however, no dispute as to the value of the horses to a recovery of which, or to compensation for the value of which, the defendant is entitled. The value of all of the horses and machinery sold at the sheriff's sale was put by the plaintiff himself at \$1,928, while the value of the horses bid in by him at the sheriff's sale, but for which he was afterwards compelled to settle with the true owners, was set by him at \$600. This is the only positive evidence on the subject. It is true that the record of the sheriff's sale shows that the goods and articles were sold in the aggregate for some \$2,009, that is to say, for \$81 more than the plaintiff's estimate, and that the five horses settled for were all bid in by him for about \$427, but there is no pretense that the amounts for which the horses were bid in at such sale represented the real value thereof. The

same considerations apply to the failure to specifically describe the property. It is true that, as a general rule, the verdict should describe the property involved with such definiteness and certainty that it may be clearly identified (34 Cyc. 1530), and that such was not done in the case at bar. There is, however, no question as to the description of such property, or as to the articles and horses to a return of which the defendant was entitled. The description, indeed, is given in the sheriff's report of sale, to a return of all of the articles mentioned to which the defendant is entitled, except the five horses afterwards settled for with the defendant's son and Horn & Anderson, and described in the evidence and report of sale as "one black colt with a silver mane and tail, one black mare, one bay mare colt, one bay horse colt two years old, and one steel-grey colt."

Such being the state of the evidence, it would be a travesty on justice for this court to reverse the judgment and to order a new trial, subjecting both the county and litigants to unnecessary expense, if the same result can be accomplished by a modification of the judgment. If, therefore, the defendant will consent to the entry of a judgment for the return of the horses and machinery described in the sheriff's certificate of sale, with the exception of the five horses last mentioned, and in the case of a failure of such return, for the sum of \$1,328, the trial court is directed to enter such a judgment. Otherwise, the judgment of the District Court will be reversed and a new trial ordered.

BURKE, J., being disqualified, did not participate, and the Hon. SAMUEL L. NUCHOLS, Judge of the Twelfth Judicial District, sat in his stead.

STATE EX REL. NOGGLE v. CRAWFORD, Judge.

(138 N. W. 2.)

Certiorari — remedy — jurisdiction — irregularities.

1. The supreme court will not review by certiorari an order of the district

Note.—On the question of appeal as precluding remedy by certiorari, see note in 103 Am. St. Rep. 111. And for the exceptions to the rule that certiorari will not lie where there is an appeal, see note in 50 L.R.A. 787.

court permitting claimants of a fund which had been deposited with the clerk of court by a garnishee to intervene for the purpose of asserting rights therein. In making such order the court did not exceed its jurisdiction, and at most the order is erroneous merely, and may be corrected by appeal.

Certiorari — jurisdiction — aggrieved party has adequate remedy by appeal.

2. Certiorari will not lie to review alleged errors not going to the jurisdiction of the inferior court; nor will it lie where, as in this case, the party aggrieved has an adequate remedy by appeal.

Opinion filed October 17, 1912.

Certiorari to review an order of the District Court for Stark County permitting claimants of a certain fund paid into court by a garnishee to intervene for the purpose of asserting rights therein.

Writ quashed.

Heffron & Baird, of Dickinson, for relator.

Thos. H. Pugh, of Dickinson, for respondent.

FISK, J. On the application of petitioner, supported by affidavit, this court issued a writ of certiorari on July 24th last, to review an order of the district court of Stark county, which order in effect permitted certain parties claiming an interest in funds which had been paid into court by a garnishee in certain garnishment proceedings pending in said court, to intervene for the purpose of asserting their claim to such fund. Such order also directed the plaintiff in the garnishment action to restore said funds which had theretofore been paid to him under the directions of the court, to the custody of the clerk, there to abide the result and determination of the issues raised by the intervenors.

Respondent has made due return to the writ, setting forth the following facts:

"1. That on the 21st day of December, A. D. 1912, in an action pending in the said district court of Stark county, wherein the above named petitioner was plaintiff and George W. McClellan was defendant, a final judgment was rendered and entered in favor of the plaintiff and against the defendant for the sum of \$673.03, and the costs of suit of \$35, mak-

Note.—The authorities on the exclusiveness of jurisdiction of court of last resort to issue remedial writs for prerogative purposes are reviewed in a note in 13 L.R.A. (N.S.) 768. And for certiorari in exercise of superintending control over inferior courts, see note in 51 L.R.A. 33.

ing a total judgment of \$703.03, a true transcript of which is hereunto attached and marked 'Exhibit 1.'

"2. That in said above-entitled cause one T. F. Powers & Company, had been summoned as a garnishee of the above-named defendant, George W. McClellan, and on the 9th day of November, A. D. 1911, made answer thereto, which answer was filed in said cause with the clerk of said court on the 20th day of April, A. D. 1912, as appears by and from the files of the clerk of said court, a true transcript of which is hereto attached and is marked 'Exhibit 2.'

"3. That thereafter on or about the 17th day of May, A. D. 1912, said garnishee, T. F. Powers & Company, brought into said court and deposited with the clerk thereof, under a written deposit, the sum of \$85.95 as appears from the files of the clerk of said court, a transcript of which written deposit is hereto attached and marked 'Exhibit 3.'

"4. That thereafter and on the 20th day of May, A. D. 1912, upon application of the plaintiff made *ex parte*, I made order herein directing the clerk of said court to pay to said plaintiff any and all sums of money which had been or thereafter might be deposited with him in said action, a true transcript of said order is hereto attached and marked 'Exhibit 4.'

"5. That thereafter and on the 3d day of June, A. D. 1912, the affidavit of Gus Anderson, one of the members of the firm of Anderson & Himmelspace, a copartnership, wherein, for said copartnership he claimed an interest in said money so deposited as aforesaid, and for the first time called the attention of the court to the answer and disclosure of garnishee, T. F. Powers & Company, and the terms thereof was presented to me, a true transcript of which is hereunto attached and marked 'Exhibit 5.' That upon said affidavit, and on motion of Anderson & Himmelspace that said Anderson & Himmelspace be interpleaded and that said money be returned to the deposit until the disposition of the issues which were by the answer of the garnishee and which should be by the interpleader of the said Anderson & Himmelspace raised, I issued an order to show cause why said Anderson & Himmelspace should not be interpleaded and said money be returned to the deposit, a true transcript of which said order to show cause is hereunto attached and is marked 'Exhibit 6.'

"6. That the hearing on said order to show cause came on to be heard before me at my chambers at Dickinson, North Dakota, July 8, 1912.

Thos. H. Pugh appeared as attorney for the motion and Heffron & Baird, attorneys for the plaintiff, appeared in opposition thereto.

"After hearing said motion, which was based on the exhibits hereinbefore referred to, I thereupon, to wit, on the 10th day of July, A. D. 1912, made an order herein permitting the said Anderson & Himmelspach, as claimants to the money aforesaid, to be interpleaded in the said garnishment proceedings, and that said money be returned to said deposit there to await determination of the matter, to the end that the equitable rights of the several parties claiming interest in said money might be adjudicated, a true copy of said order is hereto attached and is marked 'Exhibit 7.' "

From the return, as well as from the order which it is sought to have reviewed, it appears that the learned district judge deemed the order theretofore made by him directing the clerk to pay to plaintiff the funds thus deposited, as improvidently made under misapprehension as to the facts, but however this may be, we are agreed that petitioner is not entitled to the remedy by certiorari to review the order complained of for at least two obvious reasons: First, certiorari will not lie to review alleged errors not going to the jurisdiction of the inferior court. Under the plain language of § 7810, Revised Codes 1905, a writ of certiorari may be granted only in cases where such inferior courts, officers, boards, or tribunals have exceeded their jurisdiction. It cannot be correctly said that the court exceeded its jurisdiction in making the order. At most, such order was merely erroneous. The case of *State ex rel. Enderlin State Bank v. Rose*, 4 N. D. 319, 26 L.R.A. 593, 58 N. W. 514, which has been called to our attention, is not in point. The order there was not made in any pending action or proceeding, and, as the court held, was clearly void as being in excess of jurisdiction. Not so in the case at bar.

By what we have above stated we do not mean to intimate that such order was even erroneous. That question is not before us, and cannot properly be here considered.

The second reason why petitioner cannot invoke this remedy is that the order sought to be here reviewed is appealable. That such order is appealable under the provisions of § 7225, Revised Codes 1905, as construed by this court, is, we think, beyond question. *Bolton v. Donovan*, 9 N. D. 575, 84 N. W. 357; *Northern P. R. Co. v. Barlow*, 20

N. D. 197, 126 N. W. 233, Ann. Cas. 1912 C, 763; and authorities cited.

See also cases cited in note to *Olson v. Mattison*, 16 N. D. 231.

For the above reasons the writ must be, and the same is hereby quashed.

MEAD v. FIRST NATIONAL BANK OF LANSFORD.

(138 N. W. 365.)

Courts — jurisdiction of county courts.

Section 111 of the state Constitution construed, and *held*, that county courts of increased jurisdiction are not vested with equity powers, but that their jurisdiction is restricted to actions formerly cognizable at law wherein the amount in controversy does not exceed \$1,000.

Opinion filed October 17, 1912.

Appeal by defendant from an order of the County Court for Renville County, *Percy S. Crewe, J.*, overruling a demurrer to the complaint in an action to quiet title to certain property.

Reversed.

Morton & Mohr and Palda, Aaker & Greene, for appellant.

J. E. Bryans (R. H. Grace of counsel), for respondent.

FISK, J. This is an appeal from an order of the county court of Renville county overruling a demurrer to the complaint on the ground that such court had no jurisdiction of the subject of the action.

The action, as disclosed in the complaint, is one to determine adverse claims and to quiet title to certain real property therein described, and also for the recovery of damages for its use and for waste. The cause of action is therefore clearly one for equitable cognizance, and the sole question for our determination is whether, under the Constitution and statutes of this state, county courts of increased jurisdiction possess equity powers concurrent with the district courts in such cases, where the amount involved does not exceed \$1,000.

Section 111 of the state Constitution confers exclusive original jurisdiction on county courts in probate and testamentary matters, as well as the appointment and control of guardians; and it also provides that when the voters of any county having a population of two thousand or over shall decide by a majority vote that they desire the jurisdiction of said court increased, "then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed \$1,000."

In 1909 the legislature passed an act to govern the practice in county courts of increased jurisdiction (chap. 80, Laws of 1909), § 1 of which defines the jurisdiction of such courts in the exact language of the constitutional provision above quoted. Such statute is quite comprehensive and purports to lay down a complete code of rules to govern the practice in such courts, but suffice it to say that the legislature has not attempted by this statute, nor by any other enactment, to broaden the jurisdiction conferred by § 111 of the Constitution upon such courts; nor could it do so legally in the face of such constitutional provision, which expressly defines the extent of the jurisdiction to be exercised by county courts of increased jurisdiction. We are confronted, therefore, solely with a question of constitutional construction. Did the framers of the Constitution intend by the words, "said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed \$1,000," to confer upon such courts jurisdiction over equity causes? That this question must be answered in the negative is, we think, very clear. While it is true, as contended by respondent's counsel, that the words, "in all civil actions," would, when taken alone, be broad enough to include all actions whether at law or in equity, still, when we consider the qualifying words immediately following, "where the amount in controversy does not exceed \$1,000," we are forced to conclude that the intent was merely to confer jurisdiction in those actions wherein it is possible to measure in dollars and cents the amount in controversy. This being true, the cause of action in the case at bar cannot be embraced within such constitutional provision. As before stated, the action is to determine adverse claims and to quiet title to real property, and it cannot be said that the amount in controversy is any definite sum of money. In order to be embraced within

the constitutional language above quoted, it must be a case where there is an "amount in controversy" which may be measured in money, for the subsequent language of the section contains the words, "does not exceed \$1,000." In defining the jurisdiction of district courts in § 103 of the Constitution, it is quite significant that the words, "in all civil actions," were not used, but instead we find the expression, "it shall have original jurisdiction . . . of all causes both at law and equity," and is it not fair to assume that if it was the intention of the framers of the Constitution in defining the jurisdiction of county courts of increased jurisdiction, to confer equity powers on such courts, that they would have employed similar language to that employed in § 103, merely adding the qualification as to the amount in controversy?

Most of respondent's argument is based upon the words in § 111 of the Constitution, that "said county court shall have concurrent jurisdiction with the district courts *in all civil actions* . . ." But the fallacy of such argument is made apparent upon reading the next section of the Constitution, relating to justices of the peace, where this identical language is used in defining their jurisdiction. Surely it will not be contended that such language confers on justices of the peace jurisdiction in equity cases. If respondent's contention is sound in the case at bar, then, upon like reasoning, justice's courts possess jurisdiction in all equity cases where the amount involved does not exceed \$200, except in those cases wherein the boundaries of or title to real property comes in question.

At and prior to the date of the adoption of our Constitution, original jurisdiction in equity cases was vested solely in the district courts, being the courts of general jurisdiction, and it is entirely clear that a change in this respect was not contemplated by the framers of the Constitution, for, as above stated, by § 103 these courts are given original jurisdiction "of all causes, both at law and equity." The same distinction that formerly existed between actions at law and suits in equity is here recognized in so far as the vesting of jurisdiction is concerned. The fact that under our reformed procedure all forms of actions are abolished, and legal as well as equitable remedies are administered in but one form of action, known as a civil action, does not operate to change in any way the fundamental and long recog-

nized distinction existing between the principles which govern in the exercise of jurisdiction in law and equity cases. And we are convinced that, in conferring upon county courts and justices of the peace concurrent jurisdiction with the district courts in certain cases, the framers of our Constitution had in mind merely those cases formerly designated as actions at law, as distinguished from suits in equity, and wherein is directly involved a sum in money or personal property not exceeding a stated amount. This has evidently been the construction given the Constitution by our legislature and by the bar generally ever since statehood, and while not controlling, this is a fact entitled to much weight by this court. In the Code of Civil Procedure (§§ 7512 to 7518, Rev. Codes 1905), provision is made for the foreclosure of liens on personal property by actions in the *district courts*. No like provision is found for such foreclosures by actions in county or justice's courts. Again, by chapter 80, Laws of 1909, being the practice act for county courts, we find that in § 3 the parties are given the benefit of only those provisional remedies which are applicable to law actions as distinguished from equity causes, the provisional remedies of injunctions and receivers being omitted therefrom.

Our attention has been called to the case of *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355, which was an appeal from a judgment of a county court foreclosing an alleged farm laborer's lien, and it is said that we there in effect recognized the jurisdiction of the county court in such cases. This may be true, but no such question was there raised or called to our attention, and the sole question in fact considered was whether a woman employed on a farm as a domestic was a farm laborer and entitled to a lien for wages under § 6277, Rev. Codes 1905. We do not deem this case binding on us as a controlling precedent in the case at bar.

Entertaining the foregoing views, we are compelled to reverse the order appealed from, and it is so ordered.

BANNER MERCANTILE COMPANY v. C. J. HENDRICKS.
et al.

(138 N. W. 993.)

Necessaries — liability of wife — validity of statute as to.

Action to recover for family necessities consisting of food and clothing sold and delivered by plaintiff to defendant, C. J. Hendricks. His wife is joined with him as defendant, and liability, as against her, is asserted under the provisions of chapter 136, Laws 1907, wherein it is provided "that husband and wife shall be jointly and severally liable for any debts contracted by either while living together, for necessary household supplies of food, clothing, and fuel for themselves and family," etc. A recovery against the wife is sought to be reversed upon the grounds that both the complaint and the evidence are insufficient to justify such recovery, and that chapter 136 is unconstitutional. Each of such contentions is held without merit.

Opinion filed November 20, 1912.

Appeal by defendant Anna Hendricks from a judgment of the District Court for Nelson County, *Charles F. Templeton, J.*, in plaintiff's favor in an action to recover for merchandise sold and delivered by plaintiff to defendants.

Affirmed.

Frich & Kelly, for appellant.

The complaint does not state facts sufficient to constitute a cause of action against Anna Hendricks. *Henry v. Hickman*, 22 Ala. 685; *Cunningham v. Fontaine*, 25 Ala. 644; *Durden v. McWilliams*, 31 Ala. 438; *Dunbar v. Meyer*, 43 Miss. 679; *Gabriel v. Mullen*, 30 Mo. App. 464; *Valentine v. Lloyd*, 4 Abb. Pr. N. S. 371; *Smith v. Sherwin*, 11 Or. 269, 3 Pac. 686; *Hall v. Thurman*, 58 Iowa, 754, 12 N. W. 141; 21 Cyc. 1561; *Glass v. Steadman*, 86 Ga. 696, 12 S. E. 1067; *Fitzmaurice v. Buck*, 77 Conn. 390, 59 Atl. 415; *Kelly v. Canon*, 6 Colo. App. 465, 41 Pac. 833; *Holmes v. Page*, 19 Or. 232, 23 Pac. 961.

Note.—On the question what constitutes "family expenses" within the statute rendering wife or her property liable for such expenses, see notes in 21 L.R.A.(N.S.) 277, and 32 L.R.A.(N.S.) 940.

And upon the liability of a wife for family expenses as affected by act of husband, see note in 3 L.R.A.(N.S.) 145.

A. V. A. Peterson, for respondent.

The complaint states a cause of action under the statute. *Bowman v. Eppinger*, 1 N. D. 21, 44 N. W. 1000; *Chilson v. Bank of Fairmount*, 9 N. D. 97, 81 N. W. 33; *Schweinber v. Great Western Elevator Co.* 9 N. D. 113, 81 N. W. 35; *James River Nat. Bank v. Purchase*, 9 N. D. 280, 83 N. W. 7; *McCartney & Sons Co. v. Carter*, 129 Iowa, 20, 3 L.R.A.(N.S.) 145, 105 N. W. 340; *Marquardt v. Flaughter*, 60 Iowa, 148, 14 N. W. 214.

FISK, J. This action originated in justice court, where appellant recovered judgment. An appeal was taken to the district court, where judgment was rendered in respondent's favor pursuant to a verdict directed by the court, from which judgment this appeal is prosecuted by the defendant Anna Hendricks alone.

The assignments of error relate to the sufficiency of the complaint as against this appellant, and also to the sufficiency of the evidence thereunder. The assignments of error predicated upon certain rulings in the admission and exclusion of testimony need not be specially noticed, as they are based upon the appellant's contentions relative to the sufficiency of the complaint and the proof offered in support thereof.

The complaint, omitting formal parts, is as follows:

"Plaintiff for its complaint alleges:

That it is a corporation organized and existing by virtue of the laws of North Dakota, and defendants are husband and wife, living together during the times hereinafter mentioned.

That, at the special instance and request of the defendants, it sold and delivered to them certain merchandise, consisting of household supplies, food, and clothing, between the 15th day of June, 1909, and the 9th day of April, 1910, both dates inclusive.

That said goods and merchandise were of the reasonable value of \$101.15, and no part of the same has been paid except \$30, although often payment was demanded.

Wherefore, plaintiff demands judgment against defendants and each of them for \$71.15 with interest since April 9th, 1910, at the rate of 7 per cent per annum, together with the costs and disbursements herein."

While such complaint, when literally construed, states a cause of

action against both defendants, upon the theory that the merchandise therein mentioned was sold and delivered by plaintiff to them jointly at their special instance and request, plaintiff's counsel at the trial expressly disclaimed any intention of asserting any liability on the part of this appellant, Anna Hendricks, as a purchaser of such merchandise, stating that his "object and purpose in this action is to endeavor to hold the defendant Anna Hendricks liable under chapter 136 of the Session Laws of 1907." Nor is there any evidence in the record from which the recovery against her can be sustained upon the theory that she was a joint purchaser with her husband of such merchandise, the evidence disclosing that plaintiff sold the goods to the husband and upon his credit alone.

We are therefore called upon to determine, first, whether the recovery against Anna Hendricks, the appellant, can be sustained under the complaint. Second; if so, whether the proof is sufficient to sustain such recovery; and, if these questions are answered in the affirmative, then third; whether chapter 136, Laws of 1907, is constitutional.

The sufficiency of the complaint is challenged by appellant's counsel, first, because it fails to allege that she has a separate estate, describing the same; second; it fails to state that the goods were purchased by either spouse for use in their family, or that such goods were consumed by the family, and third, it fails to point out the particular statute under which it is attempted to hold her liable. Numerous authorities are cited in support of such contentions, among them being the cases of *Smith v. Sherwin*, 11 Or. 269, 3 Pac. 686; *Glass v. Steadman*, 86 Ga. 696, 12 S. E. 1067; *Fitzmaurice v. Buck*, 77 Conn. 390, 59 Atl. 415. In *Smith v. Sherwin*, *supra*, the action was brought against the wife alone, and the complaint charged the sale and delivery of the goods to her at her special instance and request, alleging her promise to pay their reasonable value. Her answer was a general denial. In the opinion of the court it is, among other things, said: "This action was apparently founded upon § 9 of the act of 1878, which provides: 'Contracts may be made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried.' . . . Section 10 of the same act makes the property of both husband and wife chargeable with family expenses, *but there is nothing in the complaint, in the present*

action, to indicate that it is the liability thus created by positive statute that is sought to be enforced. The complaint in this instance does not state the facts which would make the respondent liable under § 10 of this statute, and we cannot regard the action as founded upon it." (The italics are ours.) We think the language thus italicized differentiates that case from the case at bar. In the case at bar all the facts showing defendant's liability under chapter 136, Laws of 1907, are stated with the exception of the fact that the household supplies were purchased "for themselves and family." The portion of said statute material to this controversy reads: "Provided, however, that husband and wife shall be jointly and severally liable for any debts contracted by either while living together, for necessary household supplies of food, clothing, and fuel for themselves and family, and for the education of their minor children."

The complaint alleges that defendants are and were at all times therein mentioned husband and wife living together, and that the merchandise sold and delivered consisted of household supplies, food, and clothing. These allegations must be treated either as surplusage, or as tending to show a joint and several liability on the part of the defendants for the debt contracted by one of them, under the provisions of chapter 136. The complaint should be construed liberally as against the attack here made, and when thus construed we think it sufficient to support the recovery. From the facts thus alleged, and from the undisputed evidence in the record, we think a fair inference arises that the debt contracted was for necessary household supplies for the defendants and family, and this appellant was fairly apprised from the allegations of the complaint that plaintiff sought to hold her liable with her husband therefor under the provisions of chapter 136 aforesaid.

We have examined the other cases cited by appellant and find nothing therein which militates against our conclusion as above announced. The rule quoted from 21 Cyc. 1561, by appellant's counsel, is not applicable, for chapter 136 does not make the wife's separate estate alone liable, but, in the language of such statute, she and her husband are made "jointly and severally liable for any debts contracted by either while living together, for necessary household supplies," etc. Therefore the wife is made personally liable, and a separate estate

owned by her is not a prerequisite to her liability for such supplies. The true rule applicable to this case is stated in 21 Cyc. 1560, as follows: "Where, however, a married woman may be sued and a judgment obtained against her, as a *feme sole*, it is not necessary to allege that she possesses a separate estate," citing numerous authorities. It was clearly not necessary to plead the statute under which it is sought to hold appellant liable. It is a general statute, and it was only necessary to allege facts from which such statutory liability arose.

But it is contended by appellant that, even though the complaint and the proof are sufficient to sustain the recovery, still, there must be a reversal because the evidence discloses that, as between the plaintiff and appellant's husband, the account was stated; and the cases of *Kelly v. Canon*, 6 Colo. App. 465, 41 Pac. 833, and *Holmes v. Page*, 19 Or. 232, 23 Pac. 961, are cited in support thereof. There is no merit in this contention. Plaintiff is not seeking to hold appellant on an account stated, and, of course, could not, for the simple reason that she was not a party thereto. The cases cited merely hold to this principle. In the Colorado case suit was brought against both husband and wife on notes executed by the husband alone, and it was held that no recovery could be had against the wife for the reason that she was not a party to the notes, although the complaint alleged that such notes were given for an indebtedness for expenses of the family of the defendants; and in the Oregon case it was merely held that the wife is not liable on a contract based on an account stated between the husband and the plaintiff, and to which she had not assented. In this connection, see *McCartney & Sons Co. v. Carter*, 129 Iowa, 20, 3 L.R.A.(N.S.) 145, 105 N. W. 339, and *Marquardt v. Flaughter*, 60 Iowa, 148, 14 N. W. 214. As the complaint discloses, in the case at bar the action is not on an account stated, and the appellant is sought to be held liable under the statute aforesaid.

The only other remaining question is that of the constitutionality of chapter 136. This question is not argued by appellant, and we deem an extended discussion unnecessary. It is contended that said chapter violates § 213 of the Constitution of this state. That section reads: "The real and personal property of any woman in this state acquired before marriage, and all property to which she may after marriage become in any manner rightfully entitled, shall be her separate prop-

erty, and shall not be liable for the debts of her husband." We do not think there is any merit in appellant's contention. The statute in question does not seek to make the wife liable for the husband's debts, but it merely modifies and broadens the common-law rule regarding liability for family necessities. Under the common-law doctrine, the wife had no separate estate, and when this rule was changed by our statute, so as to permit the wife to hold property in her own right the same as a *feme sole*, it was, we think, a wise and just act on the part of the legislature to change the rule relative to liability for necessities of the family, and that the legislature possessed the power so to do is, we think, entirely clear. No authority is cited to the contrary by appellant's counsel, and we believe none exists.

It follows that the judgment appealed from is correct, and it is accordingly affirmed.

STATE v. BANKS et al.

(138 N. W. 973.)

Appeal — findings of fact by trial court — weight.

1. In a law case wherein a jury is waived, the findings of the trial court on questions of fact are entitled to the same weight on appeal as given the verdict of a jury on such questions.

Appeal — review of findings of fact.

2. On the trial of a cause at law by the court, findings of fact sustained by substantial evidence will not be disturbed on appeal.

Action on bail bond — sufficiency of evidence to sustain finding.

3. Evidence examined in a case brought by the state to recover on a bail bond, and *held*, that a finding that the bondsmen did not arrest, surrender, deliver, or commit the defendant to the custody of the court or proper officer, as required by law, is sustained by substantial evidence.

Opinion filed November 20, 1912.

Appeal by defendants from a judgment of the District Court for Ransom County, *Allen, J.*, in plaintiff's favor in an action to recover on a bail bond.

Affirmed.

Rourke & Kvello and *E. F. Hull*, for appellants.
Curtis & Curtis, for respondent.

SPAULDING, Ch. J. This is an action to recover on a forfeited bail bond given before trial of the principal on the charge of having committed a misdemeanor. A jury was waived and trial had by the court. The court found as a fact that the defendants in this case did not arrest, surrender, deliver, or commit the defendant in the criminal case to the custody of the court or proper officer, as required by law. A judgment was entered against the defendant bondsmen.

It may be conceded that the evidence on the question of surrender is in conflict, but it is elementary that if such is the case, and there is any substantial evidence to sustain the finding of the court on the facts, such finding cannot be reversed by this court. We are satisfied from an examination of the record that there is sufficient evidence to justify and sustain the finding, above referred to, by the trial court. The accused, one Christianson, was held to answer on the charge of maintaining a common nuisance on the 15th day of October, 1909; he was released on giving an undertaking for \$500, with appellants as sureties. The terms of the undertaking are fixed by the Code, and are: "That the above-named Samuel Christianson will appear and answer to the charge above mentioned, in whatever court it may be presented, and will, at all times, hold himself amenable to the orders and process of the court, *and if convicted will appear for judgment and render himself in execution thereof*; or if he fails to perform either of these conditions, that he will pay to the state of North Dakota the sum of five hundred and no hundredths dollars."

The evidence shows that he was tried and convicted at Lisbon, the county seat of Ransom county, on the 17th day of November, 1909; and that appellant James K. Banks was in attendance during the trial, but left before the jury returned a verdict. He testified that the next morning he was informed of the verdict of guilty, and in the afternoon of the same day Christianson came to his office in Sheldon, and that thereupon he called up Curtis, state's attorney, by telephone, and asked him what Christianson was doing at Sheldon; that Curtis replied that he was out on bonds, and that if he did not want him there to bring him back; that he informed Curtis that he

did not wish to carry him back unless it was necessary, whereupon Curtis replied that he would not be wanted for three or four days; that during the evening of the same day he received a telephone call from Curtis telling him he better send Christianson down in the morning; that he reiterated that he did not want to unless it was necessary, and he was informed that he had better do it, because the judge had decided that he wanted him in the morning; and that he was told by Curtis to take him over to the train and deliver him to the sheriff, who would be on the train in the morning.

That he looked for Christianson in the morning and learned that he was out in the country a short distance, at work; that he sent for him; that at train time he did not see anything of him; that he went to the train, met the sheriff inside a car, and told him that Curtis had told him to surrender Christianson to him; that he had agreed to do so, but that he was out in the country and he had sent for him. While he was explaining to the sheriff, Christianson came in the car door, the train began to move, and he said to the sheriff: "Here he is now," and left the sheriff and Christianson standing talking, while he jumped off the train; that he did not know what became of Christianson; that he did not bring Christianson to the sheriff's office, nor before any court, nor any officer excepting the sheriff, to whom he delivered him; that he had a talk with Curtis on the afternoon of the 18th, but Curtis did not ask him if he delivered Christianson to the sheriff in discharge of his bond; and that deputy state's attorney Dwyre did not ask him, so far as he recollected, if he had surrendered Christianson to the sheriff in discharge of his bond.

On redirect examination he testified that he surrendered him for the purpose of being relieved from his bond, and did so in pursuance of the directions of the state's attorney, who said, in substance, that if he desired to be released, he could surrender the defendant to the sheriff.

The sheriff testified that he met Banks and Christianson at the train at Sheldon when he was returning from Fargo with a prisoner. He then testified in substance to the conversation with Banks, the same as Banks had testified, and that he informed Banks that he would take him down to Lisbon, but that Banks did not use the word "surrender" in the conversation with him, but did bring the prisoner

and deliver him to him; that he understood he was to bring him to Lisbon and was responsible for him until he got there. He found other matters to take his attention when he reached Lisbon, and he told Conboy, his deputy, to take the prisoner to Curtis, who would tell him what to do; that he did not know what the situation was with Christianson, and for that reason told him to take him to the state's attorney.

Conboy testified that the sheriff told him to take the prisoner to the state's attorney; that he took him to the courthouse, he believed into the court room; that Curtis and Dwyre were there at the time, and Curtis said to let him go until after dinner, which he did, and never saw him afterwards. That he did not remember Curtis asking him if Christianson had been surrendered by his bondsmen, and telling him that if he had not been, they had nothing to do with him; that he did not think such a conversation took place.

Curtis, the state's attorney, testified about being called on the telephone by Banks, about telling him that he could surrender Christianson to the sheriff at the train in discharge of the bond, or that he could take such steps as he wanted to pursue, but that he did not tell him he wanted him there; that he called him up as a matter of accommodation, so Banks could save the expense of bringing him down; that when Conboy brought him into the court room he asked Conboy if Christianson was surrendered in exoneration of his bond, and was informed by Conboy that he was not; that he told Conboy that they then had nothing to do with him,—he was out on his bond; that later in the day he had a conversation with Banks in which he asked him particularly if, when he took Christianson to the train, he turned him over to the sheriff in discharge of his bond, and that Banks said, no; that Dwyre had a conversation over the telephone which he heard one end of, and asked Banks the same thing; that he did not tell the deputy sheriff at any time to turn him loose.

Dwyre testified as to his telephone conversation with Banks, and hearing Curtis's conversation with him; that to the best of his recollection Curtis asked Banks if he surrendered Christianson in discharge of his bail; that his best recollection was that he did not himself ask Banks that question, but he testified he did ask him if he wanted him put in jail, and he said, no.

Assuming that a surrender of the defendant after verdict, but before sentence, could be made by the bondsmen to the sheriff, outside of court, without any arrest by anyone, there appears to be a conflict in the evidence as to whether Banks did surrender him in exoneration of his bond. His intent is an important element in the consideration of this question, and in determining what his intent was the question testified to by Curtis, and the answer thereto as he says it was given by Banks, that he did not turn him over to the sheriff in discharge of his bond, and the answer to Dwyre, that he did not want him put in jail, were material elements; and we think, taken altogether, the evidence is sufficient to sustain the finding of the court on this question of fact, all the time assuming that a surrender could be made as we have said, in that manner. It was evident that the court did not attach much weight to the statement by Banks that he surrendered the prisoner to the sheriff for the purpose of being relieved from his bond, and that the evidence may be construed as contended by the state, to the effect that Banks simply placed him under the oversight of the sheriff, the same as he might have asked any other person to keep an eye on him, to save himself the trouble of going to Lisbon. Our assumption that a surrender could be made outside of court or in the manner indicated, and the bondsmen thereby discharged without action of the court, if such had been the intent of the bondsmen, is only for the purpose of the case, and is not intended as even an intimation that it could be so done. The statute governing the surrender of a defendant by bail is as follows:

Section 10266, Rev. Codes of 1905: "Any person charged with a public offense and admitted to bail may be arrested by his bail at any time before they are finally discharged, and at any place within the state; or by a written authority indorsed on a certified copy of the undertaking of bail, they may empower any officer or person of suitable age and discretion to do so, and he may be surrendered and delivered to the proper sheriff or other officer, before any court, judge, or magistrate having the requisite jurisdiction in the case; and at the request of such bail, the court, judge, or magistrate shall recommit the party so arrested to the custody of the sheriff or other officer, and indorse on the undertaking of bail, or certified copy thereof, after notice of the state's attorney, and if no cause to the contrary appears,

the discharge and exoneration of such bail; and the party so committed shall be held in custody until discharged by due course of law."

Section 10267: "If, without sufficient excuse, any person who has given an undertaking in a criminal action or proceeding neglects to appear according to the terms or conditions of the same, either as a witness or for hearing, arraignment, trial, or judgment, or upon any other occasion when his presence in court or before the magistrate may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the matters to be entered upon its minutes and the undertaking of bail, or the money deposited instead of bail, as the case may be, is and shall be thereupon declared forfeited; but if, at any time before the final adjournment of the court, such person or his bail appears and satisfactorily excuses his neglect, the court may direct the forfeiture to be discharged upon such terms as may be just. After the forfeiture, the state's attorney must proceed with all due diligence, by action against the bail jointly or severally in his discretion, upon the undertaking so forfeited. If money instead of bail is so forfeited, the clerk of the court, or other officer with whom it is deposited, must immediately after the final adjournment, or at such time as the court may direct, pay over the money deposited to the county treasurer."

Section 10269. "No action brought on an undertaking of bail is barred or defeated, nor shall judgment thereon be arrested by reason of any neglect or omission to note or record the default of any principal or surety at the term or session when such default happened, nor by reason of any defect in the form of the undertaking, if it sufficiently appears, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized and required to take the same."

Section 10270: "Any surety on such undertaking may be discharged from further liability thereon, at any time before final judgment against him, by surrendering to the court or proper officer the principal in such undertaking, if such principal is a defendant in a criminal action, or if such principal is held as a witness in such action and it has not been tried; or by paying to the clerk of the court the amount specified in such undertaking, with costs, as the court may direct."

The last two sections quoted were enacted subsequent to the enactment of the preceding sections.

The judgment is affirmed.

Goss, J. (specially concurring). The statement of facts in the main opinion is very general and tends to conceal what might be termed the equities of the defendants. All facts and circumstances in evidence, considered together, disclose that the defendants fully sensed their responsibility as bail, and sought to fulfill the spirit of the law and discharge themselves as bail. But notwithstanding their endeavors in such particular, the evidence is somewhat indefinite on the fact of the surrender to the sheriff. The delivery of the prisoner was undoubtedly intended by the defendants to have been made in exoneration of bail, but a question of fact exists as to whether the sheriff so received the prisoner, the delivery having been hastily made at the train with no time for extended inquiry or explanation. In fact, the sheriff testifies concerning such surrender that "he didn't exactly know what the situation was with Christianson, and for that reason" sent him to the state's attorney. As to who was negligent in the subsequent release resulting in the escape of the prisoner is immaterial. The fact remains that the evidence raises a conflict on facts as to whether the sheriff understandingly received Christianson from Banks in discharge and exoneration of bail, or whether he received him into his custody acting in law as an agent for Banks in conveying the prisoner previously arrested by bail to the county seat to be thereafter remanded to custody, with exoneration of bail to be entered, prior to which the release and escape occurred. On this question of fact the findings of the trial court, contrary to the contention of the defendants, is conclusive; and upon such ground alone concurrence is had in the decision announced by the majority opinion, which, by the way, meets with the concurrence of all members of the court solely on facts, even though the contrary might be the inference from the quotations in the opinion of the various statutory provisions as to bail, none of which are interpreted or construed or passed upon in the opinion as the writer understands said holding.

STATE EX REL. RED RIVER BRICK CORPORATION et al. v.
DISTRICT COURT OF THE COUNTY OF GRAND FORKS
et al.

(138 N. W. 988.)

Supreme court — superintending control.

1. Under the provisions of §§ 86 and 87 of the Constitution, the supreme court is given superintending control over inferior courts, and has the power to issue any of the writs therein named and such others as may be necessary to the proper exercise of such control.

Supreme court — superintending control.

2. The superintending power of the supreme court is primarily over courts, and was granted to insure the harmonious working of our judicial system to meet emergencies, and for cases where other relief provided is inadequate or incomplete, and not for purposes of review as by appeal.

Remedy by appeal — adequacy.

3. Whether the remedy by appeal is adequate or speedy must be determined by the exercise of the sound discretion of this court, applied to the facts in each given case.

Supreme court — superintending control.

4. The primary function of this court is the determination of appeals, and its appellate jurisdiction is the one which must be sought by litigants seeking relief, wherever it is applicable and furnishes them adequate and speedy protection, and its superintending power should not be exercised except in case of emergency, exigency, or when necessary by reason of the lack of any other adequate remedy, or when the ends of justice make its exercise imperatively necessary.

Supreme court — superintending control — remedy by appeal.

5. Proceedings were instituted in the district court of Grand Forks county for the purpose of punishing certain parties for alleged contempt, consisting in disobedience to the prohibitions of a judgment theretofore entered in an action in that county pending an appeal to this court, on application for a writ commanding the district court in which such proceedings were maintained, to vacate its order dismissing the contempt proceedings, and commanding it to punish the parties named for contempt. *Held*, that relator has an adequate remedy by appeal, and that no such emergency is disclosed, and no such failure of justice

Note.—The authorities on the question of superintending control and supervisory jurisdiction of superior over inferior courts are reviewed in an extensive note in 51 L.R.A. 33, and in a supplemental note in 20 L.R.A.(N.S.) 942.

appears imminent, as will warrant this court, in the exercise of its power of superintending control, to make the alternative writ permanent; and it is therefore quashed and the proceeding dismissed.

Opinion filed November 20, 1912.

Mandamus by the Red River Valley Brick Corporation, Falconer Township, and School District No. 59, against the District Court of the First Judicial District, and *Kneeshaw, J.*, sitting at the request of *Templeton, J.*

Writ quashed.

George R. Robbins and *George A. Bangs*, for relators.

J. B. Wineman, for respondents.

SPALDING, Ch. J. Briefly, the history of the matter involved in this proceeding is as follows: The city of Grand Forks, under the authority of §§ 2825 et seq., Rev. Code 1905, as amended by chap. 47, Laws of 1907, chap. 58, Laws of 1909, and chap. 47, Laws of 1911, attempted to extend its boundaries so as to embrace and include something over 700 additional acres, including 10 acres belonging to the Red River Valley Brick Corporation, one of the relators herein. In proceedings thereafter instituted in the district court, Hon. Chas. F. Templeton, as judge of Grand Forks county, entered judgment holding such proceedings void and the attempted annexation invalid, and restraining the city and its officers and agents from exercising or attempting to exercise any authority or jurisdiction by reason thereof, and particularly from assessing, for purposes of taxation, the property situated in the territory so attempted to be annexed.

May 22d, 1912, defendants perfected an appeal to the supreme court from such judgment. The appeal was taken by service of notice, and the giving of bond was especially waived. Whereupon the city assessor of Grand Forks, acting upon the advice of the city attorney, is alleged to have proceeded to assess the property lying within the proposed extension. The corporations of which it had been parts did the same. The city assessor's assessment was certified by him to the city board of equalization; the township assessments, to the county board. The assessment by the city was made May 27th, and the books were certified

June 1st, and the relators' knowledge thereof was acquired June 5th, 1912. Relators thereupon immediately applied to Hon. C. F. Templeton, judge of said district, for an order requiring the city and its officers to show cause why they should not be punished for contempt for the violation of the injunctional portion of the judgment. Owing to the illness of Judge Templeton, such order was made returnable before Hon. W. J. Kneeshaw, of the seventh district, by whom it was heard. It is claimed by relators that on the hearing held June 19th the assessor and city attorney expressly admitted the violation of the injunction. The court, at the conclusion of the hearing, made its order dismissing the order to show cause and the contempt proceedings.

This court is asked, in the exercise of its superintending control over inferior courts, to review the action of the district court, and direct it to find the parties mentioned guilty of contempt, and punish them accordingly, on the theory that their admission of a violation of the injunctional portion of the judgment deprived the district court of discretion in the premises, and that it was its duty to find them guilty of contempt. On the hearing on the return day of the alternative writ, the defendants submitted a motion to quash, and also made return. The conclusion which has been reached by this court makes it unnecessary to enter into details regarding the motion and return. Sufficient reference will be made to them in the course of this opinion.

The history of the supervisory control of courts of last resort over inferior courts is a very interesting study, but to enter into a consideration thereof would unduly extend this opinion, and it can be so readily found in most comprehensive yet condensed form, in books accessible generally to the bar, that we feel no useful purpose would be served by reviewing it at this time. We call especial attention to *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, 79 N. W. 1081, and the comprehensive note to that case, found in 51 L.R.A. 33; also the several opinions of the learned judges of the supreme court of Wisconsin, in *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158; *State ex rel. McGovern v. Williams*, 136 Wis. 1, 116 N. W. 225, and note in 20 L.R.A.(N.S.) 942; and the opinion of Chief Justice Brantly in *State ex rel. Whiteside v. First Judicial Dist. Ct.* 24 Mont. 539, 63 Pac. 395.

The sections of the Constitution bearing on the subject of the supervisory control of the supreme court over inferior courts are as follows:

Sec. 86: "The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law."

Sec. 87: "It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same."

The legislative assembly has made regulations regarding the issuance of the writ of mandamus, which we need not notice further than that they provide for the writ to be directed to an inferior tribunal to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, or to compel the admission to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by any inferior tribunal. Section 7822, Rev. Codes 1905. And that the writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Section 7823, Rev. Codes 1905. It is apparent from the foregoing constitutional provisions that this court is possessed of several separate and distinct classes of power, only one of which need be considered here. It is unquestionably given superintending control over inferior courts, and it has the power to issue any of the writs named, and such others as may be necessary to the proper exercise of such control. In several cases this court has passed upon its power to issue prerogative writs, and has held that it would issue them only when the sovereignty of the state, its prerogatives, or the liberties of its citizens were involved, or the matter was *publici juris*. The respondents cite and rely upon such cases. They, however, are not authority when the court is requested to exercise its superintending control.

In other instances we have been called upon to supervise and review the proceedings of inferior courts, but it has generally been held that a proper case was not presented for the exercise of this power. *Gunn v. Lauder*, 10 N. D. 389, 87 N. W. 999; *State ex rel. Dorgan v. Fisk*,

15 N. D. 219, 107 N. W. 191; *Murphy v. District Ct.* 14 N. D. 542, 105 N. W. 728, 9 Ann. Cas. 170; *State ex rel. Atty. Gen. v. District Ct.* 13 N. D. 211, 100 N. W. 248; *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866; *Selzer v. Bagley*, 19 N. D. 697, 124 N. W. 426; *Stockwell v. Crawford*, 21 N. D. 261, 130 N. W. 225.

This superintending power conferred by the Constitution of this state, as well as by most of the other Constitutions, is primarily over courts, and was granted so there might be some method by which the harmonious working of our judicial system could be insured, and to meet emergencies, and where other relief provided is inadequate or incomplete. Its relation to litigants is only incidental. It was not intended to grant, by this provision, the power of review as by appeal. That power is the first power enumerated in § 86, and is separate and distinct from the superintending power. *People v. Richmond*, 16 Cal. 278; *State ex rel. Fourth Nat. Bank v. Johnson*, *supra*; *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158; *State v. First Judicial Dist. Ct.* 24 Mont. 539, 63 Pac. 395. It is held in the last cited case that the writs enumerated in the Constitution are not the appropriate writs for the exercise by the supreme court of its superintending control, but, in effect, that the character of the writ must be determined on the facts and by the necessities of each case, and that it should be denominated, whatever its character, a "supervisory writ." We deem the appellation of the "writ" as wholly immaterial.

When a proper case arises for the exercise of this power, the writ necessary to fit the case may take the nature of a command or of a prohibition, or, to enable the court to determine its character, it may be found necessary to issue a preliminary writ requiring records to be certified up, and this may be done. We are satisfied that the authorities to which reference has been made are applicable here, and that their determination of the purpose of the Constitution framers in granting this superintending control is correct. It has been so intimated in several of the cases decided by this court, to which reference has been made. Whether or not the remedy by appeal is adequate or speedy must be determined by the exercise of the sound discretion of this court, applied to the facts in each given case. *State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 107 N. W. 191. And this rule has been held to apply to the original writs when not sought to control the action of an inferior

court. Among other authorities, see *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385; *State ex rel. Byrne v. Wilcox*, 11 N. D. 329, 91 N. W. 955; *Duluth Elevator Co. v. White*, 11 N. D. 534, 90 N. W. 12; *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706. We are satisfied that the power of superintending control is very broad, but in line with the authorities cited, and many more which have been examined, we feel constrained to hold that this power should not be exercised except in case of emergency or exigency, or when made necessary by the lack of other adequate remedy, or when the ends of justice imperatively demand it. It has been repeatedly held that the primary function of this court is the consideration of appeals. If it was intended by the Constitution framers that this court should exercise its superintending power over the inferior courts at the behest of litigants, for the purpose of reviewing and revising their decisions, there would have been no occasion to make a separate specification of appellate power, as was done. The appellate jurisdiction of this court is the one which must be sought by defeated litigants seeking relief, in all cases where it is applicable and furnishes adequate and speedy protection to them. Cases may well be imagined, and they do sometimes arise, where no other provision has been made, or where an appeal would be partially or wholly ineffectual by reason of the exigencies of the situation. It was entirely appropriate that provision should be made for such emergencies, and this has been done by granting the power which we are considering.

In *State ex rel. Atty. Gen. v. District Ct.* 13 N. D. 211, 100 N. W. 248, application was made to this court for a writ of mandamus directed to the judge of the fourth judicial district, commanding him to proceed forthwith to hear and determine on the merits an application which he had dismissed, or to show cause, etc. The proceeding which had been dismissed was one instituted for the purpose of removing a sheriff from office. It was held that the writ was not available where there was another plain, speedy, and adequate remedy in the ordinary course of law to accomplish the same purpose; that it would not lie for the purpose of controlling an inferior court in the exercise of its judicial discretion, or if the court had decided erroneously, it was an error in the exercise of its jurisdiction, to be corrected on appeal, and that it

would not be compelled to reverse the decision on mandamus; and that a dismissal did not deprive the relator of an adequate remedy.

In *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866, the writ was denied because the relators had an adequate remedy by appeal, although the application was to this court to exercise its superintending control.

In *State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 107 N. W. 191, this court issued a writ of prohibition against the judge of the district court, prohibiting further proceedings in an action seeking to enjoin a board of drainage commissioners from acting regularly within its exclusive jurisdiction, because that court had exceeded its jurisdiction, and to permit it to proceed would delay a public improvement of importance; but held that the remedy should be cautiously granted.

In *Selzer v. Bagley*, 19 N. D. 697, 124 N. W. 426, a writ was denied because the right of appeal existed, and it was held that the fact that an appeal could not be heard as speedily as the writ would act did not furnish grounds for issuing the writ.

In *Lewis v. Gallup*, 5 N. D. 384, 67 N. W. 137, a writ of certiorari was denied against a justice of the peace for the same reason.

In *Huron v. Campbell*, 3 S. D. 309, 53 N. W. 182, the supreme court of that state held that, under the provisions of its Constitution regarding superintending control, that court has ample authority, to be exercised within its judicial discretion, to issue a writ to review the proceedings of subordinate courts, where the action complained of is beyond the discretionary powers of such courts, or where there is an abuse of such discretion, *and the remedy by appeal is inadequate and the case is urgent and the circumstances require prompt action on the part of the appellate court to prevent injustice and injury resulting.*

In *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 770, the California court held that the propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final, and if not, as to whether the system of practice furnishes any other adequate remedy; that where the determination was not intended to be final, but there is another plain, speedy, and adequate remedy, the writ cannot issue, as it was not designed to usurp the place of other remedies; but that it must issue where no other adequate remedy is

provided, as otherwise there would be an admitted wrong without a remedy, and a failure of justice.

We now proceed to determine whether, by the record on the instant application, a case is presented coming within what we have construed to be the proper and legitimate province of this court under its superintending control grant of power. As we have seen, a judgment was entered by the district court enjoining the defendants from doing certain acts. An appeal was taken from that judgment to this court. By stipulation of the parties, the giving of a supersedeas bond was waived. No contention is made that the effect of the appeal was different from what it would have been had a bond been given. We must assume that the defendants proceeded to do the acts forbidden by the judgment. The district court initiated proceedings to punish them for civil contempt. There is a diversity of opinion as to whether the appeal superseded the judgment. It is maintained by the defendants that it did, and that they were therefore free, while the appeal was pending and undetermined, to perform their official duties, though prohibited by the judgment. On the other hand, the relators herein contend that the character of the acts to be performed was of a nature not covered by an appeal, but that the prohibition and injunction still remained in force. It is apparent that on the determination of this question depended the fact of a contempt. The court discharged the contempt proceedings and declined to punish the defendants, whereupon these proceedings were instituted to compel the court, by the exercise of the superintending control of this court, to revoke its order of dismissal and proceed to punish the defendants for disobedience of the mandates of the district court judgment. It appears by the record that at the hearing the defendants frankly admitted the doing of some of the acts prohibited. Their excuse is legal advice to the effect that the appeal relieved them of the injunction. The court did not, of record, determine this question, but held that there had been no intentional contempt committed, and also attempts to justify his action by other considerations.

The only emergency called to our attention is the fact that the property of a considerable number of citizens, located in the territory sought to be included within the corporate limits of the city of Grand Forks, has been assessed by the city, and that the assessment will be spread

upon the tax rolls of the county, and that the financial affairs of the minor municipal corporations, of which this territory had constituted parts of the city, county, and state, will become involved by reason thereof, and because of the delay occasioned by an appeal. Our attention is called to the Wisconsin cases hereinbefore cited, and others, as authority for this court to direct the district court not only to proceed with the matter in question, but how to do so and how to decide it; this on the theory, which is strenuously urged, that the district court had no discretion in the premises; that its refusal to hold the defendants was in violation of law and the rights of the parties. We deem it altogether unnecessary to determine any questions as to the effect of the appeal on the provisions of the judgment of the district court. Some very broad language is contained in some of the Wisconsin authorities, but it is evident that the language of the opinions must be read in the light of the facts dealt with, and when so read these authorities clearly and fully recognize that it is not the duty of the supreme court to direct or control the judgment or discretion of a trial court, at least not so except in case of an emergency, and when great injustice would necessarily result from not so doing.

The facts involved in the Wisconsin cases are too complicated and extended to set out fully. It is sufficient to say that in *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, 51 L.R.A. 33, 79 N. W. 1081, the court held that, by the grant of superintending control, the supreme court is endowed with a separate and independent jurisdiction which enables and requires it, in a proper case, to control the course of ordinary litigation in inferior courts; that is, power and the right to hear and determine the cause on the writ, including the determination of questions of fact; and that no part of such power can be taken away by statute; that under such power the supreme court will compel an inferior court to perform a duty imposed by statute, not discretionary in its nature, and also compel action where discretion is to be exercised, when it clearly appears that such discretion has not been exercised; or that action had been taken in manifest disregard of duty, or without semblance of legal power, and where it further appears that there is no remedy by appeal, or, if there is, that it is entirely inadequate, and that the exigency is of such an extreme nature as to justify the interposition of this extraordinary power. So far

as need be stated, the records of that case disclose that the affairs of an insolvent bank were involved; that its assets consisted largely of commercial paper, uncollected, on which suit had not been brought and on which the statute of limitations would run in a very short time and before an appeal could afford any adequate remedy, and the writ was accordingly granted.

In *State ex rel. Fourth Nat. Bank v. Johnson*, 105 Wis. 164, 83 N. W. 320, the same insolvent estate was again involved. The district court did not comply with the terms of the order made in the case before cited, in all respects, and a writ was granted, but it was said that "it has always been understood to be what it is in fact, a power to be used only when there is no other remedy under our judicial system that will meet the situation and prevent irreparable mischief, and when that mischief springs from something other than mere error of judgment," and that it was evident that the proceedings of the trial court were ruled by a misconception of the statutory rights of petitioning creditors, and that that court had assumed and exercised power which it did not possess, and refused to exercise power which it was clearly called upon to exercise, by statute; that thereby the statute was nullified, and that the wrong perpetrated could not be redressed in any other way than in the summary method of appeal to the constitutional superintending power of the supreme court.

In *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158, the writ was denied, the facts being that complaint had been made before a justice of the peace against an individual, charging him with an offense; that he had been convicted and sentenced by the justice, and had appealed to the circuit court; that before a jury was impaneled by the circuit court in the case, a motion was made and granted to quash the complaint and for the discharge of the defendant, because the complaint failed to state facts sufficient to constitute an offense under the laws of the state, and the court refused to proceed further with the action. The supreme court, while recognizing the general rule that mandamus will not issue under the superintending control to serve the purpose of a writ of error to review judicial action of a trial court, held that that rule was subject to limitations which were applicable to criminal cases, and which need not be mentioned here; but it held that where it appears that the duty of the court below is

plain, the refusal to perform such duty clear, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate, that this was sufficient to arouse the jurisdiction of the supreme court under its power of superintending control. It then considered the question of an exigency warranting the exercise of that power, and held that, in view of the facility with which further prosecution might be maintained, if found necessary, no such serious prejudice would result from the action of the trial court as to call for the exercise by the supreme court of this power of superintending control. Appended to the opinion in the last cited case is a lengthy review by Judge Marshall, of that court, of the Wisconsin authorities on subject, and a keen analysis of the different powers possessed by the appellate court. This review is worthy the perusal of every student of our judicial system.

It was again held in *State ex rel. Schultz v. Halsey*, 149 Wis. 551, 136 N. W. 285, that, "in order to justify the exercise of that extraordinary jurisdiction, the duty of the lower court must be plain, its refusal to proceed in the performance of that duty clear, the results of such refusal prejudicial, the remedy by appeal or writ of error utterly inadequate, and the application for relief by mandamus prompt."

It will be seen from these statements, notwithstanding the broad language used in the first case cited, from the Wisconsin court, the doctrine there prevails that there must be an emergency or exigency, or some special and pressing reason why the superintending power should be exercised.

In the case at bar we are unable to reach the conclusion, even though the decision of Judge Kneeshaw was erroneous, or even, in some degree, arbitrary, which we do not determine, that this power should be put forth. The right of appeal from the original judgment existed; it has been exercised; the case is in this court, and in the ordinary course of procedure will be heard within a comparatively short time. If that judgment is affirmed and the tax levied, and the assessment, directly or indirectly, found invalid and void, it cannot be assumed that the officials, either city or county, will fail to do their duty in the premises, and if they do so, no serious detriment will be occasioned the relators. The record shows that the property in the territory in question has been assessed by the officials of the other municipal cor-

porations, and hence, in case of affirmance, they will not lose the revenue to which they are entitled, while if the trial court is reversed, they are not entitled to such revenue.

No appeal is taken which does not cause one or both parties more or less inconvenience and delay in securing their rights, but irreparable injury will not result, so far as we are able to ascertain, from the delay occasioned by the pending appeal, and no such emergency exists as would justify this court in granting the permanent writ. Should we do so in every case in which some inconvenience is occasioned by the delay incident to an appeal, we should be utterly unable to hear and determine cases here on appeal, which it has been said and held is the primary function of this court.

It is argued by defendants that an appeal having also been taken from the order dismissing the contempt proceedings, we should not consider this application. We do not notice that contention further than to remark that on such appeal the action of the district court can be more fully and fairly reviewed than under the present proceedings, and if it should be determined that its action was erroneous, in view of the record before it, the relators will still have as ample opportunity to recoup themselves for the expenses incurred as they would have if the writ were now granted.

It is urged that the writ should issue for the purpose of asserting and maintaining the respect due to the judgments of the courts, and for other similar reasons. We are not unmindful of the fact that it is the duty of all courts to maintain their proper authority, and to insist upon obedience to their orders and judgments. It is only by so doing that courts are able to serve the public by which they are maintained, and insure the due administration of justice and protect the lives, the liberty, and the property of the citizens. No trifling by litigants or others should be permitted with the mandates of the courts. They are constituted for the purpose of settling differences, and in recognition of the fact that there must be some final arbiter of legal controversies, and if the result of litigation is to be minimized or destroyed by trifling of parties and the indifference of courts to their own judgments and orders, the purpose for which they are established is largely, if not wholly, nullified, and litigants are without protection; but charges of contempt in trial courts are at least primarily de-

terminable in the forum where or against which they are alleged to have been committed.

In addition to the foregoing, we may say that it has been held by courts of at least two states specifically that a final order of a trial court refusing to punish for wilful contempt of its orders cannot be reviewed under a writ of mandamus, and that where contempt proceedings have been dismissed, the appellate court will not by mandamus compel the trial court to punish. *Heilbron v. Superior Ct.* 72 Cal. 96, 13 Pac. 160; *State ex rel. Thatcher v. Horner*, 16 Mo. App. 191.

The writ is denied, and the alternative writ quashed.

**SHERLOCK v. MINNEAPOLIS, ST. PAUL, & SAULT STE.
MARIE RAILWAY COMPANY.**

(138 N. W. 976.)

Injury at railroad crossing — contributory negligence.

1. A driver about to cross a railroad track at a public crossing in the country is charged with knowledge that such crossing is a dangerous place, and that it cannot be assumed that cars are not approaching from either direction. He is bound to assume that cars are coming until satisfied by direct evidence to the contrary, and to this end must vigilantly use his senses of sight and hearing and do all that ordinary care and prudence would dictate, having in view the surrounding circumstances, to avoid injury, regardless of whether any signal is given by an approaching train.

Note.—On the question of the effect of continuing negligence of person injured on liability of railroad company, see note in 55 L.R.A. 418. And upon the duty as to place and direction of observation, see note in 37 L.R.A.(N.S.) 136. And for failure to give customary signals as excusing nonperformance of duty to look and listen, see note in 3 L.R.A.(N.S.) 391. And as to the care and precautions necessary in crossing a railroad track, generally, see notes in 24 L. ed. U. S. 403 and 51 Am. Rep. 360.

Upon the right to rely on presumption of self-preservation in action for negligent killing at railroad crossing in order to prevent nonsuit where there were no eye-witnesses to the killing, see note in 11 L.R.A.(N.S.) 844. And as to the presumption of care of person killed at crossing, see notes in 16 L.R.A. 261; 4 L.R.A. (N.S.) 344; and 116 Am. St. Rep. 125.

Injury at railroad crossing — duty to look and listen.

2. Where the exercise of ordinary precautions of looking and listening and making an intelligent use of one's faculties to inform himself as to the approach of a train is neglected, and when the taking of such precautions would have avoided an accident, negligence is conclusively established, in the absence of conflict in the evidence on these subjects.

Concurrent negligence.

Where an injury is due to the negligence of both parties no recovery can be had.

Injury at railroad crossing — measure of care.

4. The greater the danger, by reason of weather conditions rendering it difficult to see a train or hear its approach, the greater the caution necessary to constitute ordinary care.

Contributory negligence — presumption from law of self-preservation.

5. The law of self-preservation may usually be considered in favor of the plaintiff, where doubt exists as to his ability to see or hear an approaching train; but when no such doubt appears, and it is clear that had he looked and listened he could have seen such train, and the evidence shows that he was not in the exercise of ordinary care, no inference arising from the instinct of self-preservation is applicable in his favor.

Care at railroad crossing — duty to look and listen.

6. While there may be exceptional circumstances excusing a party from the observance of the rule regarding looking and listening, it is *held*, that the facts of this case disclose no such circumstances.

Care at railroad crossing — duty to look and listen.

7. It is the traveler's duty to look in both directions, at a crossing, for trains; and this rule is emphasized where there are two tracks which render it possible for trains to approach from either direction or pass each other at the crossing.

Duty to look and listen at railroad crossing — diversion of attention.

8. The only diversion of attention excusing failure to look and listen at a railroad crossing is where the attention is so irresistibly forced to something else as to practically deprive a traveler of the opportunity to look and listen.

Appeal — harmless error in exclusion of evidence.

9. The exclusion of evidence of witnesses as to the possibility of their hearing the signals of the train, if any were given, just prior to the accident, was nonprejudicial, when it was the duty of the deceased to look and listen regardless of signals.

Evidence — photographs.

10. While great care should be exercised in receiving photographic exhibits showing elevations, they may be received when properly verified and it is clear that conditions were the same when taken as when an accident occurred.

Evidence — photographs.

11. Plaintiff's husband was killed at a railway crossing, December 14, 1906. Photographic exhibits offered in evidence were taken the following June. The record discloses that the conditions were the same as when the accident occurred, except as to snow, and the removal of one building on the side of the highway not necessary to consider in relation to the issues. *Held*, that the difference in conditions, under the circumstances disclosed, was immaterial.

Injury at railroad crossing — contributory negligence.

12. Plaintiff's husband was driving a team and grain tank north on a highway toward a railroad crossing, at a slow walk, and was killed by a train on the crossing approaching from the east at from 8 to 10 miles per hour. The view from the highway for at least 1,700 feet south of the crossing of the railway toward the east was unobstructed except by two houses on the east side of the highway. It was 277 feet from the most northerly house to the crossing. For that distance the view was quite unobstructed. The deceased, while passing at least between the house and the crossing, looked steadily toward the northwest. He wore a fur coat with a collar turned over his ears. The wind was from the northwest. He made no effort, at least during that distance, to ascertain the approach of any train from the east. *Held*, that, assuming that no signal was given by the train, he was guilty of contributory negligence, and not exercising his senses of seeing and hearing, precluding a recovery for his death.

Opinion filed November 20, 1912.

Appeal by plaintiff from a judgment of the District Court for Barnes County, *Burke, J.*, dismissing the complaint in an action brought to recover damages for the death of plaintiff's intestate.

Affirmed.

Statement by SPALDING, Ch. J. This appeal was taken from a judgment of the district court of Barnes county in favor of the defendant, and from an order denying new trial. The action was for damages for causing the death of Thomas Sherlock at defendant's crossing, and the defense was contributory negligence of said Sherlock. At the close of the case the court, on motion, directed a verdict in favor of the defendant. The facts disclosed are about as follows:

The deceased, Thomas Sherlock, was the husband of Mary Sherlock, plaintiff. He was employed by a milling company in Valley City as a teamster. December 14, 1906, while in such employment he was en-

gaged in hauling wheat from the elevator in North Valley City to the mill of his employer in Valley City, and while driving a tank wagon north was hit by a train from the east, consisting of a snow plow, engine, and caboose, moving from 8 to 10 miles per hour. The elevator and mill were somewhat over a mile apart. He had been engaged in this occupation for some days, and was thoroughly familiar with the road leading between the two points, and with the crossing over the railroad track where he was killed. He was in the entire possession of his faculties. In making his trips he passed along a public highway, north from the city of Valley City to the elevator at North Valley City, which elevator was on the north side of defendant's railroad track, which, at the point of crossing, consisted of its main line and side or passing track. The road over which he traveled crossed the Sheyenne river, 1,700 feet south of the railroad crossing, and was graded up a foot or more above the level of the prairie; and there was snow upon the road 1 foot or over deep.

Defendant's line runs, at the point of crossing, a little south of east, and the crossing is nearly at right angles. This railroad is visible from the road, over which the deceased traveled, a mile or farther in an easterly direction, and can be seen from the highway at least all the distance from the Sheyenne river crossing, to the highway crossing where the accident occurred, except for two houses situated on the east side of the highway and facing west, and possibly a shack or barn close to the track, but which, on account of being low posted and setting below the track, either did not obstruct the view or obstructed it to so slight an extent as to be immaterial. The grade of the railroad track for practically the entire distance visible from the highway was considerably elevated above the surrounding prairie.

It was 277.8 feet from the track to the north line of the north house, to which reference has been made, and the distance between that and the other house 14.75 feet. The north house had a front toward the highway of 18.25 feet, north and south, and was 24.23 feet in depth, east and west, and the more southerly house was 25.25 feet by 24.5 feet. The north house was a story and a half, and the south one one story, high. The barn, nearer the track, was a little over 20 feet in length, east and west, and about 12.25 feet north and south. The total height of the building was 10.3 feet. It stood 94 feet south of

the center of the main track, and the ground on which it stood was considerably lower than the track.

The depot building at North Valley City is 649.46 feet nearly west of the crossing. The deceased was standing up in the wagon and had on a fur coat with collar turned up over his ears. His back, according to the uncontradicted evidence, was turned toward the east, and he appeared to be watching the depot, or a train standing near and west of the depot, apparently taking water or fuel. The day was cold, with considerable wind from the northwest and some snow blowing, and perhaps falling, but the amount of snow and storm was not sufficient to prevent a fairly clear view of the track to the east. He was seen and watched by several witnesses during more or less of the time from his passing the houses until he reached the place of the accident. One Weimer, who resided in the north house, testified that he was out of doors when the accident occurred, and saw the deceased pass his house and drive toward the track, and saw the accident; that his team was going at a slow walk, and he did not try to hurry them when he reached the track; that the deceased could see down the track for a considerable distance but that he was looking toward the depot.

A daughter of this witness also testified to seeing deceased coming, and witnessing the accident; that she first saw Sherlock when opposite the north house; that he was looking toward the depot, and continued to look toward the depot, and did not turn toward the east; that where she was on the ground she could see east a quarter of a mile; that the little barn might have obstructed the view a little ways; that she could see the railroad bridge a quarter of a mile east; that deceased was not looking toward the incoming train, but kept his head towards the west; that his team was walking.

One Kuester testified that at the time of the accident he was in the house farthest south; that he saw Sherlock driving past; that when he went past he was standing up, looking toward the depot. He saw the accident plainly. He did not see Sherlock all the time between his house and the track.

One Briggs testified that he was near the depot when the accident occurred; that he saw Sherlock about 200 feet before he got to the railroad track; that he was looking northwest; that he last saw deceased right close to the crossing; and that he was still looking west, and the

train just a few feet from him; that he seemed to be looking toward the depot all the time; that he first saw the train coming three quarters of a mile east, and could see it clearly and plainly as it continued up to the crossing; that the barn to which reference has been made did not obstruct the view between the highway and the railroad for anyone driving along; that cars were visible over the top of it; that the snow was blowing some but not enough to obstruct the vision; that he could see clearly and plainly.

There is a conflict in the evidence as to whether the whistle was blown or bell rung. Photographs taken the 13th of June, 1907, were received in evidence. The photographer testified that he had been engaged in the business for more than twenty years; that the writing on the back of the photographs were notations made and measurements taken by him when he made the photographs; that they were correct, and represented the location of his camera and the direction in which it was pointed; that he had been familiar with the location of North Valley City since it started; that he was familiar with the buildings in question on the 14th of December, 1906; also with the changes which had been made between that time and the time of the photographs; that everything remained in the same condition as when the accident occurred, except the snow had disappeared and a building on the west side of the highway had been removed.

In Exhibit No. 1 the camera was placed 50 feet south from the main line of the railroad, in the center of the road, and pointed west. It shows an unobstructed view between the depot, where the witness Briggs was at the time of the accident, and the highway to the crossing.

In Exhibit No. 2 the camera was placed in the same position but pointing easterly, and shows an unobstructed view of the track toward the east from this point until the railroad strikes the hills to the south-east, which is a mile or more.

Exhibit No. 3 is a photograph taken looking easterly, with the camera placed in the center of the road, 290 feet south of the main track, it showing between the two houses referred to. It shows an unobstructed view of the track for a short distance, looking between the two houses.

Exhibit No. 4 shows the track looking easterly from a point in the road 100 feet south of the main line, and the view includes the barn

to which reference has been made. It shows the view at this point of the track unobstructed until it reaches the hills, and also shows to some extent the elevation of the track above the surrounding ground and the barn.

Exhibit No. 6 was taken in the center of the road, 230 feet south from the main line, looking east, and also shows an unobstructed view of the track, east to the point where it enters the hills, except that it indicates that the barn, if the deceased was no higher from the ground than the camera, would partially obstruct the view of the track for a few feet,—the length of two or three cars.

Exhibit No. 8 shows an unobstructed view of the track for a long distance, from a point in the road 25 feet south of the main line, looking east.

There was no conflict in the evidence except as to the engineer giving a signal, and as to the extent to which the storm and snow obstructed the vision, but no witness testified that the conditions were such as to obscure the sight of the train for less than half a mile. One witness testified that he watched the train coming three quarters of a mile.

Errors are assigned on the direction of the verdict for defendant, and upon various rulings on the admission and rejection of evidence. Sufficient reference will be made to these later as considered.

M. A. Hildreth, for appellant.

This case should have been submitted to the jury, and it was error to direct a verdict for the defendant. *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Coulter v. Great Northern R. Co.* 5 N. D. 568, 67 N. W. 1046; *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; *Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 367, 121 N. W. 830; *Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co.* 20 N. D. 642, 127 N. W. 993; *Washington & G. R. Co. v. McDade*, 135 U. S. 554–571, 34 L. ed. 235–241, 10 Sup. Ct. Rep. 1044; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Goodwin v. Central R. Co.* 73 N. J. L. 576, 64 Atl. 134,

20 Am. Neg. Rep. 433; *Martin v. Southern P. R. Co.* 150 Cal. 128, 88 Pac. 701.

Deceased was not guilty of contributory negligence as a matter of law. *Atchison, T. & S. F. R. Co. v. McClurg*, 8 C. C. A. 322, 19 U. S. App. 346, 59 Fed. 860; *Ramsey v. Louisville, C. & L. R. Co.* 89 Ky. 99, 20 S. W. 162; *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105; *Strong v. Sacramento & P. R. Co.* 61 Cal. 329, 11 Am. Neg. Cas. 196; *Goodenough v. Pennsylvania R. Co.* 55 N. J. L. 596, 27 Atl. 931; *Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454.

Lee Combs and *L. S. B. Ritchie* (*A. H. Bright*, of counsel), for respondent.

Deceased was guilty of contributory negligence, and no recovery can be had for his injury and death. 2 *Thomp. Neg.* 1656. See also *Scott v. St. Louis, I. M. & S. R. Co.* 79 Ark. 137, 116 Am. St. Rep. 67, 95 S. W. 490, 9 Ann. Cas. 212; *Payne v. Chicago & N. W. R. Co.* 108 Iowa, 188, 78 N. W. 813; *Schneider v. Northern P. R. Co.* 81 Minn. 383, 84 N. W. 124, 9 Am. Neg. Rep. 74; *Olson v. Northern P. R. Co.* 84 Minn. 258, 87 N. W. 843; *West v. Northern P. R. Co.* 13 N. D. 229, 100 N. W. 254; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; *Shatto v. Erie R. Co.* 59 C. C. A. 1, 121 Fed. 678, 13 Am. Neg. Rep. 698; *Horn v. Baltimore & O. R. Co.* 4 C. C. A. 346, 6 U. S. App. 381, 54 Fed. 301; *Swanger v. Chicago, M. & St. P. R. Co.* 132 Iowa, 32, 109 N. W. 308; *Pyle v. Clark*, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744, 2 Am. Neg. Rep. 100; *Chicago, R. I. & P. R. Co. v. Pounds*, 27 C. C. A. 112, 49 U. S. App. 476, 82 Fed. 217; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 489; *MacLeod v. Graven*, 19 C. C. A. 616, 43 U. S. App. 129, 73 Fed. 627, 7 Am. Neg. Cas. 396; *Southern R. Co. v. Smith*, 40 L.R.A. 746, 30 C. C. A. 58, 52 U. S. App. 708, 86 Fed. 292; *Chicago, R. I. & P. R. Co. v. Still*, 19 Ill. 508, 71 Am. Dec. 236; *Hanover R. Co. v. Coyle*, 55 Pa. 401; *Terre Haute & I. R. Co. v. Clark*, 73 Ind. 168; *Pennsylvania R. Co. v. State*, 61 Md. 108; *Brown v. Milwaukee & St. P. R. Co.* 22 Minn. 165; *Hamblin v. New York & N. H. R. Co.* 195 Mass. 555, 81 N. E. 258; *Cincinnati, N. O.*

& T. P. R. Co. v. Farra, 13 C. C. A. 602, 31 U. S. App. 306, 66 Fed. 500; Elliott v. Chicago, M. & St. P. R. Co. 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; Haas v. Grand Rapids & I. R. Co. 47 Mich. 402, 11 N. W. 216; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Pennsylvania R. Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753; Henze v. St. Louis, K. C. & N. R. Co. 71 Mo. 636; Fletcher v. Atlantic & P. R. Co. 64 Mo. 489; Gorton v. Erie R. Co. 45 N. Y. 660; Baltimore & O. R. Co. v. Hobbs, — Md. —, 19 Am. & Eng. R. Cas. 337; Lehigh & W. Coal Co. v. Lear, 6 Sadler (Pa.), 272, 9 Atl. 267; Allen v. Pennsylvania R. Co. 9 Sadler (Pa.), 382, 12 Atl. 493; Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Rothe v. Milwaukee & St. P. R. Co. 21 Wis. 258; Sheffield v. Rochester & S. R. Co. 21 Barb. 339; Steves v. Oswego & S. R. Co. 18 N. Y. 422, 12 Am. Neg. Cas. 331; Butterfield v. Western R. Corp. 10 Allen, 533, 87 Am. Dec. 678; Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; Griffie v. St. Louis, I. M. & S. R. Co. 80 Ark. 186, 96 S. W. 750; Pittsburgh, C. C. & St. L. R. Co. v. Ferrell, 39 Ind. App. 515, 78 N. E. 988, 80 N. E. 425; Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; St. Louis & S. F. R. Co. v. Barker, 23 C. C. A. 475, 40 U. S. App. 739, 77 Fed. 810; McGrath v. New York C. & H. R. R. Co. 59 N. Y. 469, 17 Am. Rep. 359; Rodrian v. New York, N. H. & H. R. Co. 125 N. Y. 526, 26 N. E. 741; Strong v. Grand Trunk Western R. Co. 156 Mich. 66, 120 N. W. 682; Shufelt v. Flint & P. M. R. Co. 96 Mich. 327, 55 N. W. 1013.

SPALDING, Ch. J. (after stating the facts). The evidence, of which we have stated what we consider the material parts, may be resolved into a showing that there was no material physical obstruction to the view of the train for nearly a mile from any point in the highway between the north house and the track, a distance of over 277 feet; that although stormy, the storm was not severe enough to prevent anyone looking down the track to the east from seeing the train nearly or quite a mile; that the deceased's team was proceeding, during the distance mentioned, at a slow walk, and that he was observed by at least four witnesses part of the way from the house to the track, and at all

times when so observed had his fur coat collar turned over his ears, and was looking to the northwest.

One witness saw him from the time he passed the house until he reached the crossing, and stated that he seemed to be looking toward the northwest all the time. It is thus clear that he made no observation calculated to inform himself of the approach of the train from the east. Presumably his attention was attracted by the blowing off of steam of the train standing back and west of the depot. There were two tracks, so it was possible for a train to approach the station from each direction, east and west.

For the purposes of deciding this appeal it must be assumed that no signal was given from the approaching train. Whatever the personal views of the members of this court may be regarding the contributory negligence of the deceased, the rule on the subject has been firmly established in this state, and we do not feel justified in departing from it, especially in view of its being supported by the great weight of authority from other courts, although counsel for appellant cites a few very respectable authorities which might seem to justify a reversal.

We first proceed to consider the law with reference to the facts, and later shall briefly consider the assignments regarding the admission and rejection of evidence.

The driver of a team about to cross a railroad track at a public crossing in the country is charged with knowledge that such crossing is a dangerous place; that it cannot be assumed that cars are not approaching from either direction, or that there is no danger therefrom. He is bound to assume that cars are coming until satisfied by direct evidence to the contrary, and to that end he must vigilantly use his senses of sight and hearing in endeavoring to avoid injury, and to do all that ordinary care and prudence would dictate to avoid injury, having in view all the surrounding circumstances; and this whether or not any signal is given by an approaching train. *Hope v. Great Northern R. Co.* 19 N. D. 438, 122 N. W. 997, and authorities cited; *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254, and authorities cited; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; 23 Am. & Eng. Enc. Law, 765.

Where the exercise of the ordinary precautions of looking and listening, and making an intelligent use of one's faculties to inform him-

self as to the approach of a train, are neglected, and when the exercise of such precautions would have avoided the accident, negligence is conclusively established. It is apparent in the case at bar that Sherlock would have seen the train had he looked to the east or listened for it any time in the 277 feet between the north house and the crossing, and without much doubt he could have seen it had he looked toward the east at any time after crossing the Sheyenne river, 1,700 feet south of the railroad crossing. Had he looked and seen it, or listened and heard it, after passing the houses, the natural instinct of self-preservation would most certainly have caused him to avoid it. The evidence fails to show that he changed the speed of his team while passing that distance. In fact, it was, as has been stated, proceeding but very slowly and must have been under his control at all times.

If the failure to give a signal from the train was negligence on the part of the defendant, the negligence of the deceased contributed to the accident, and the case, therefore, comes under the rule that where an injury is due to the negligence of both parties no recovery can be had. *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254.

The deceased was not excused by the weather from the exercise of ordinary care, even if it was sufficiently thick to render it difficult to observe the train or to hear its approach. The greater the danger the greater the care necessary for him to exercise, and the greater the caution necessary to constitute ordinary care. *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254; *Hope v. Great Northern R. Co.* 19 N. D. 438, 122 N. W. 997.

It is argued that the law of self-preservation must be taken into consideration by this court as an element of great importance, and that the presumption is that the deceased would, in the observance of that law, have stopped had it been possible for him to see the train, and that therefore he did not knowingly and recklessly attempt to cross the track. This law is entitled to great weight in a proper case, and usually may be considered in instances where doubt exists as to one's ability to see the train or hear it, but no such doubt is disclosed by the record in this case. See supplemental opinion in *Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 382, 121 N. W. 830. And the law of self-preservation, as above observed, would have worked in the deceased's favor,

and could not well have done otherwise, had he used his senses as he might and should have done. Where all the evidence shows that the deceased was not in the exercise of ordinary care, no inference arising from the instinct of self-preservation is applicable in his favor. *Gahagan v. Boston & M. R. Co.* 70 N. H. 441; 55 L.R.A. 426, 50 Atl. 146; *Baker v. Chicago, R. I. & P. R. Co.* 95 Iowa, 163, 63 N. W. 667.

It is also urged that because deceased's attention appeared to have been diverted by the train standing opposite and west of the depot, the circumstances are rendered exceptional, and that therefore the general rule relating to contributory negligence is not applicable, and that the case, therefore, became one for the jury. Numerous authorities may be found holding that extraordinary conditions and circumstances take cases out of the general rule. See *Davy v. Great Northern R. Co.* 21 N. D. 43, 128 N. W. 311. But we do not consider this case as coming within such an exception, the rule applicable being rather as laid down by many authorities that it is the plaintiff's duty to look in both directions for trains. It is obvious that this rule must be emphasized rather than relaxed where there are two tracks at the crossing, rendering it possible for trains to approach from each direction, or to pass each other; and the only diversion of attention, excusing the failure to look and listen, is where the attention is so irresistibly forced to something else as to deprive a traveler of the opportunity to look and listen. *Guhl v. Whitcomb*, 109 Wis. 69, 83 Am. St. Rep. 889, 85 N. W. 143. The facts in the above cited case are very similar to those of the case at bar. *Hain v. Chicago, M. & St. P. R. Co.* 135 Wis. 303, 116 N. W. 20; *Smith v. Chicago, M. & St. P. R. Co.* 137 Wis. 97, 118 N. W. 638; *Clemons v. Chicago, St. P. M. & O. R. Co.* 137 Wis. 387, 119 N. W. 102; *Grimm v. Milwaukee Electric R. & Light Co.* 138 Wis. 44, 119 N. W. 833; *White v. Minneapolis, St. P. & S. Ste. M. R. Co.* 147 Wis. 141, 133 N. W. 148.

That the deceased did not exercise the care with which he is charged in law, under the authority of the foregoing, and numerous other cases, is clear. The minds of reasonable men could not disagree on this. It is consequently apparent that, in the absence of reversible error on questions of evidence, the court did not err in directing a verdict for the defendant.

Regarding the errors assigned relating to the admission and rejection

of evidence, most of such assignments relate to questions concerning the probability or possibility of witnesses hearing the locomotive bell ring or its whistle blow just prior to the accident. As to these assignments, in view of our conclusion that it was the duty of the deceased to make use of his senses by looking and listening for the approach of trains, and regardless of whether signals were given or not, it is apparent that they were immaterial, and if their rejection was error at the time it occurred, it was error without prejudice.

Error is assigned on the overruling of an objection to the admission of the photographic exhibits in evidence, on the ground that there was no evidence that they were true pictures of the situation at the time of the accident. This court held in *Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 446, 15 L.R.A.(N.S.) 1162, 114 N. W. 722, 15 Ann. Cas. 97, that, if properly verified, photographs may be received in evidence to show locations and conditions.

In the case at bar there can be no question of the photographs being correct representations of the place of the accident and its surroundings when taken in the following June. The only ground for the contention that they are inadmissible would seem to be that the accident occurred in December, when the ground was covered with snow, and that one building had been removed between the date of the accident and the date of the photographs. The evidence is clear and definite that, except in these two particulars, conditions were the same. We are unable to see how the snow on the ground and the absence of snow can constitute a material difference or have any material bearing on the issues. If it has it is in favor of the plaintiff, because with a foot of snow on the highway, and the wagon of the deceased elevated accordingly above the surface of the dirt road, and the train on the rails not correspondingly raised, the power of observation of the deceased would have been greater when the accident occurred than is shown by the photographs after the snow had disappeared. The removal of the building on the west side of the highway in no manner affected the accuracy of the photographs as to the location of the houses and the track to the east, and the ability of the deceased to perceive a train coming from the east from any point between the houses and the crossing. We are not unmindful of the fact that great care should be exercised in receiving photographic exhibits showing elevations. Much of the power to judge of distances from the

pictures depends upon the kind of camera used, its focus, and its elevation; but the photographic exhibits in this case are of such a nature that they do not, we think, misrepresent the situation in the respects for which they were offered in evidence. Other assignments are without merit. The judgment is affirmed.

BURKE, J., being disqualified did not participate.

McKONE et al. v. CITY OF FARGO.

(138 N. W. 967.)

Public improvements — action to set aside assessments — limitation of actions.

An action to set aside a special assessment levied on lots to defray paving expense, where the assessment was apportioned to the property by the city special assessment commission and confirmed by the city counsel, and thereafter spread upon the tax lists, and more than six months having elapsed from the date of such approval and confirmation of the assessment by the city council without the commencement of an action to set aside the assessment for irregularities, it is *held*:

(1) That such an action begun after the expiration of six months from the date of such confirmation is barred from being maintained by the statute of limitations contained in § 2790, Rev. Codes 1905, § 155 of chap. 62, Session Laws of 1905, providing that "no action for either of said purposes shall be maintained unless it is commenced within six months after such special assessment is approved."

(2) Such statute imposing a six months' period of limitation within which to commence actions to set aside assessments is valid and enforceable, and is here applicable, notwithstanding that the title of the act specifically referred to the vacation of assessments made prior to its passage.

(3) On rehearing § 155 of the Session Laws of 1905, as to the statute of limitations concerning future assessments, *held*, not unconstitutional.

Opinion filed May 24, 1912. On rehearing November 23, 1912.

Note.—On the question of laches in attack on special assessment upon the ground that property is not benefited, see note in 36 L.R.A.(N.S.) 39.

Appeal by plaintiffs from a judgment of the District Court for Cass County, *Allen*, Special Judge, in defendants' favor in an action to set aside a special assessment levied for street paving.

Affirmed.

Robinson & Lemke, for appellants.

An assessment is void when it rests on the cost of the pavement, and not on special benefits to the property.

Cooley, Taxn. 3d ed. 1254; *Johnson v. Milwaukee*, 40 Wis. 324; *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35; *Wells v. Western Paving & Supply Co.* 96 Wis. 116, 70 N. W. 1073; *Liebermann v. Milwaukee*, 89 Wis. 336, 61 N. W. 1114; *Hayes v. Douglas County*, 92 Wis. 429, 31 L.R.A. 217, 53 Am. St. Rep. 926, 65 N. W. 483; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739; *State ex rel. Cunningham v. District Ct.* 29 Minn. 62, 11 N. W. 135.

Seth Richardson filed an additional brief on rehearing in behalf of other parties similarly situated to these appellants.

W. H. Shure, for respondent.

Public officers charged with the duty of improving the streets of a city, and authorized to levy a tax therefor upon abutting property, have performed every duty in connection therewith at the proper time and in the proper manner. *Phillips v. Sioux Falls*, 5 S. D. 524, 59 N. W. 881.

Where an estimate has been made by the city engineer and referred to the city council, and the council acts upon the estimate, it is sufficient. *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526; *Madderom v. Chicago*, 194 Ill. 572, 62 N. E. 846; 28 Cyc. 988.

An action to vacate and set aside a special assessment and enjoin the collection thereof will be barred, if not begun within the time prescribed by the statute. *Loomis v. Little Falls*, 176 N. Y. 31, 68 N. E. 105; *Lennon v. New York City*, 55 N. Y. 361; *Wahlgren v. Kansas City*, 42 Kan. 243, 21 Pac. 1068; *Marshall v. Leavenworth*, 44 Kan. 459, 24 Pac. 975; *Union P. R. Co. v. Kansas City*, 73 Kan. 571, 85 Pac. 603; *Nixon v. Burlington*, 141 Iowa, 316, 115 N. W. 239, 18 Ann. Cas. 1037; *Brown v. Grand Rapids*, 83 Mich. 101, 47 N. W. 117; *State, Vanatta, Prosecutor, v. Morristown*, 34 N. J. L. 445; *State, Bogart, Prosecutor, v. Passaic*, 38 N. J. L. 57; *Byram v. Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; *Atwell v. Barnes*, 109

Mich. 10, 66 N. W. 583; Costantine v. Albion, 148 Mich. 403, 111 N. W. 1068; Farr v. Detroit, 136 Mich. 200, 99 N. W. 19; Powers v. New Haven, 120 Ind. 185, 21 N. E. 1083.

Goss, J. This action is a direct attack upon a special assessment levied for street paving. The property involved is lot 1 of block 16, and lot 14 of block 9, in Keney's and Devit's addition to Fargo. A special assessment of \$1,356.98 for said purposes was levied and spread as a tax against each of said lots. Plaintiffs aver that "said levy and special assessment was made without any authority of law, and that in all things pertaining to the construction of said pavement and contracting for the same, and the making and filing of plans and specifications therefor, and the levy of said assessment and the pretended confirmation of the same, there was no compliance with the law." "That the cost charged against said property for such payment is confiscatory and is more than twice the amount which it adds to the value of said property." "The plaintiffs aver that under protest they have paid one tenth of the amount assessed against said property, and they are willing and ready to pay such further sum as may be just and equitable, and not in excess of the increased value of said property and the benefits to said property by reason of the construction of such pavement; and they do offer to pay in all 50 per cent of the cost of said pavement, which is in excess of any benefits to said property." The prayer for relief required defendants to set forth their adverse claims to the property, "that the validity of the same may be adjudged and determined and that said adverse claims may be adjudged void and confiscatory. And that the pavement assessment levied against said property be adjudged void on the owners paying one half of the sum without any interest, penalty, or cost." The answer detailed proceedings regularly had, including a petition for paving improvements, the granting of the same on a finding of necessity for said paving, preparation by the city engineer of plans, specifications, and estimate of the cost thereof, and its consideration and approval by the city council; the advertising for bids and the letting of the contract for construction of the paving according to said plans and specifications on file with the city auditor; the completion of said work and total cost thereof; the personal inspection by the city special assessment com-

mission and its determination in writing of the lots subject to assessment therefor and the benefits thereto, and the proportion based thereon assessable to each tract benefited; in which report and assessment each lot involved herein was reported as subject to assessment for \$1,356.98, as based upon benefits of \$2,035.47 accruing to each tract because of said paving; the fixing of a day for the review of said assessments and notice thereof to the property owners assessed, which date was February 27, 1909; the confirmation on said hearing had by the city special assessment commission of the assessment list as filed; notice by publication of such action, and that the city council would meet on April 5, 1909, at a place designated, to act further upon said list and hear any objections thereto, and its final confirmation and approval after notice on May 3, 1909; whereupon it was certified by the city auditor to the county auditor, and the assessment as made spread against all property assessed including these lots. That plaintiffs defaulted in appearing at any of said hearings, and made no objection of any kind to said proceedings until the commencement of this action on March 1, 1910, nearly a year after confirmation of the assessment. Defendants further plead that, because this action was not commenced within six months from May 3, 1909, the date of the final approval by the city council of said assessment, this action cannot be maintained. There is no denial of any of the foregoing matters alleged by answer.

On the trial no attack is made on the regularity of proceedings conferring jurisdiction upon the city council to act, and prior to letting of contracts. The plaintiffs assert that the city council lost "jurisdiction to make any assessment for two fundamental reasons, (1) the city council did not cause to be made and filed in the office of the city auditor the plans and specifications of the pavement giving all the details of the work to be done; (2) the second assessment was confiscatory, and was not based on special benefits to the lots." The above is quoted from appellants' brief, and is a summary of their contentions on the trial and on this appeal. The case below was tried with the object in view of setting aside or modifying special assessments because of defects in the plans and specifications upon which the contract was let and under which the work was done, and also because of irregularities thereafter occurring concerning the manner of the levy

of the assessments, in that the assessments are charged to have been based not on special benefits to the property correctly determined by the assessment commission, but instead, that the assessment commission arbitrarily apportioned the cost of the project between these and many other lots, and from the cost computed and assessed benefits by a method used of adding to the cost one half more than the tax the commission had previously determined the property should bear. In other words, that instead of the tax being determined proportionately from the special benefits to the property, the tax was arbitrarily assessed with reference to cost only. Plaintiffs have offered proof tending to sustain these contentions as to the method of the assessment board in determining special benefits and special assessments supposedly levied thereon as to this property and these assessments involved.

But plaintiffs are met at the threshold of the merits of this case with the established facts that the assessment had been fully made prior to, and confirmed and approved in, May, 1909, and this action was not commenced until March 1, 1910, the date of the summons. The city invokes the provisions of § 2790, Rev. Codes 1905, being § 155 of chap. 62 of the Session Laws of 1905, entitled "An Act for the Organization and Government of Cities and to Provide for the Limitation of Actions to Vacate Special Assessments Heretofore Made." The particular section of this act containing the statute of limitations here sought to be invoked against the maintenance of this action reads: "Whenever any action or proceeding shall be commenced and maintained before any court to prevent or restrain the collection of any special assessments, or part thereof, made or levied by the officers of any city for any purpose authorized by law, and whenever any action or proceeding shall be commenced and maintained as aforesaid to vacate or set aside any sale of real estate for such special assessment, or to cancel any tax certificate or deed given under such sale, and such assessment shall be held to be void by reason of noncompliance with the article, the court shall determine the true and just amount which the property attempted to be so assessed by said special assessment should pay," and enter judgment accordingly to have the force of a lien to be enforced by court action; "provided that no action for either of said purposes shall be maintained unless it is commenced within six months after such special assessment is approved, and, in case of such assess-

ment heretofore approved, within six months after this article takes effect." Can this action be maintained after the expiration of such six months' period of limitation? Plaintiffs claim the statute is not applicable, because of its title providing "for the limitation of actions to vacate special assessments heretofore made." Counsel remark: "Of course, the assessment in question was not 'heretofore made;' it did not precede the passage of the act, and so the limitation does not apply to this action," but state that "the special assessment was made under an act of 1905," the act in question. They quote in their brief §§ 142, 143, and 166 thereof, and seek to apply those provisions where they fit their side of the case, but deny the application of § 155, containing the six months' statute of limitations.

It is to be noticed that this is not a curative statute, but a statute of limitation of actions. It is couched in strong and unmistakable language: "That no action for either of said purposes shall be maintained unless it is commenced within six months after such special assessment is approved." Appellants do not challenge its constitutionality, so that is not before us. Neither is there any question of statutory construction involved. It is sufficient to set this statute of limitation running when two requisites exist, (1) a special assessment, and (2) its approval. With these existing; a lapse of six months bars the commencement of an action to assail the assessment. It is here conceded, both by the pleadings and the proof, that a special assessment was levied, but it is contended that it is void because of the manner of its levy, as not based upon specific benefits found. The assessment in question bears all the earmarks of a valid assessment. It purports to be based upon specific benefits. Both specific benefits and tax are stated in itemized amounts upon the tax list and are even specified to the cent with the utmost nicety. The regular statutory steps have all been taken. On the face then of proceedings the utmost of regularity apparently exists. Appellants now seek to go beyond the assessment altogether and impeach it by showing different special benefits than those recited in the levy, or the use of illegal methods in their determination. More than this, they seek to draw the inference from the levy on other lots that the levy made as to the two tracts in question is invalid. In this, as in their whole argument, a levy of special assessments against these two lots by the proper taxing power, and legal on the face of pro-

ceedings, is recognized and sought to be attacked after six months from its conceded approval. The assessment at most is but voidable, not void. Having all conditions named in the statute existing to set the statute in motion, we have the exact case before us for which it was intended to be applicable. If the statute does not here apply to bar the maintenance of this action commenced more than six months after approval of these special assessments, it never has application to any case.

Counsel for appellants cannot maintain but that such statutes are valid and enforceable. We quote from 1 Page & Jones on Taxation by Assessment, § 141: "Statutes are frequently found which require that objections to assessments must be made within some short space of time, and that if not so made they shall be deemed to have been waived. Such statutes are usually held to be valid if the time given is sufficient to enable the property owner to present his objections fairly. Thirty-day limitations have been upheld as in cases of assessments for street improvements or for sewers. A three-day limitation, has been upheld, even where on account of sickness the property owner was not able to file his remonstrance within the time limit. Such restrictions are held in some jurisdictions to apply to constitutional questions, as well as to failure to comply with statutory requirements, while in other jurisdictions it is held that they cannot apply to constitutional questions." To the same effect, see Hamilton on the Law of Special Assessments, §§ 530 & 531, from which we quote: "The legal truism that the statute of limitations does not run against a municipal corporation acting in the discharge of the public duty has no application to the commencement of actions at law or suits in equity begun against such corporations for violations of statutory duty in making assessments. The various statutes limiting the commencement of actions are applicable to and include these classes of cases." "A statute providing that 'no action to set aside special assessments, or to enjoin the making of the same, shall be brought, nor any defense to the validity thereof be allowed, after the expiration of thirty days from the time the amount due on each lot or piece of ground liable for such assessment is ascertained,' being within the jurisdiction of the legislature, is not such a restriction upon the rights of litigants as calls for interference on the part of the courts, if the prior proceedings are sufficient to confer jur-

isdiction upon the corporate authorities to proceed." The above quotation from such treatise on special assessments recites the Kansas statute, and for proof of its application according to its terms, see *Leavenworth v. Jones*, 69 Kan. 857, 77 Pac. 273; *Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222; *Wahlgren v. Kansas City*, 42 Kan. 243, 21 Pac. 1068; *Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82. We quote the following from the opinion in the last named case: "The language of this statute is such as to leave little or no room for construction. Its provisions are plain, direct, and positive, and seem sufficiently broad to cut off all defenses not asserted within the period of time named therein." "And if the legislature was providing a special statute of limitations different from that of the general statute, we must presume that they intended it to have the effect they said it should have, and cut off all defenses of whatever kind or character. This may be a harsh rule, but that fact does not furnish a reason why we should not construe the statute as it is, though it may furnish a reason why the legislature should modify it." This is that court's opinion of a statute granting but one sixth the period of time within which to commence action allowed in ours. Wisconsin has a similar statute with one year as the limitation period. See § 1210h, Wisconsin Revised Statutes of 1898, and as an example of its application, see *Hamar v. Leihy*, 124 Wis. 265, 102 N. W. 568, an action brought after the one-year period to foreclose a tax certificate, to which a defense of irregularity was sought to be interposed, and which the trial court on the proof made found to be a defense. On appeal the judgment was reversed, the court holding the statute of limitations to bar interposition of such defense, and that "the court below erred in admitting evidence tending to show that no valid assessment had been made, and in entering judgment setting aside and canceling the tax and tax certificate." See also a similar statute providing a thirty-day period after issuance of bonds for street improvements, within which proceedings must be begun, or bonds issued be conclusive evidence of the regularity of all proceedings prior thereto, construed and enforced in *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, regarding which that court says: "The period of thirty days after the date of the warrant, within which the statute permits an owner to prevent the issuance of any bond by filing an affidavit and requesting that no bond be issued, gives a rea-

sonable time to the owner within which to make his election whether he will take advantage of the extension of time afforded by the issuance of a bond, or, by requesting that no bond be issued, preserve such rights as he may think he has to defeat the assessment for irregularity in the proceedings. The notices having been given, he is conclusively presumed to have knowledge of his right to so elect. It should not be forgotten that at the time the assessment becomes due other persons have valuable personal property rights at stake as well as the owner." "The fact that the conclusive evidence clause of the bond act arbitrarily fixes a period of thirty days after which defects which before may have been fatal are placed beyond inquiry does not make the law unreasonable."

We believe, therefore, that § 2790 quoted bars plaintiffs from maintaining this action. For this reason it is unnecessary to decide any assignments of error urged by plaintiffs. The judgment of the trial court is affirmed with costs.

On Rehearing.

Goss, J. On petition of appellants a rehearing was granted on the sole question of the constitutionality of the part of § 155 of chap. 62 of the Session Laws of 1905, as purports to limit to six months from confirmation of the assessment the time within which to begin an action to avoid the same, which, if valid, prevents the maintenance of this action, said six-month period having expired before its commencement. This question was raised for the first time on petition for rehearing, and, although the rehearing was granted on this question alone, appellants in the additional brief filed have devoted but a small part thereof to the question of the constitutionality of the statute, and in the main have sought to reargue the case on the merits, which had already been decided in the opinion filed. The only matter now before us is the constitutionality of this limitation statute, upon which a brief has been filed in behalf of parties interested similarly to these appellants, though not before the court in this action, by attorney Seth W. Richardson, of Fargo.

Chapter 62 of the Session Laws of 1905 is entitled: "An Act for the Organization and Government of Cities and to Provide for the Lim-

itation of Actions to Vacate Special Assessments Heretofore Made." It is a comprehensive act, and intended as in part a recodification of the law applying to the organization and government of cities. It contains over fifty pages of printed matter. That portion of § 155 of said act, after referring to the commencement and maintenance of actions to avoid taxes and special assessments, reads: "Provided that no action for either of said purposes shall be maintained unless it is commenced within six months after such special assessment is approved, and in case of such special assessment heretofore approved within six months after this act takes effect." The title of the act, so far as limitation of actions is concerned, refers only to those to vacate special assessments heretofore made; while the body of the act, as to limitation of actions, covers specifically and definitely, under separate classifications, special assessments approved after the passage of the act and special assessments approved prior to the passage of the act, the act as passed embodying an emergency clause. Counsel claims the statute is unconstitutional as contravening the terms of § 61 of the Constitution, that "no bill shall embrace more than one subject, which shall be expressed in its title." This contention is based upon the fact that the title of the act mentions only "the limitation of actions to vacate special assessments 'heretofore made;'" and that the act must be construed as applying only to assessments made heretofore, that is, before the passage of the act, contending that, by the mention of assessments "heretofore made," only such assessments are within the purview of the act, and that such clause relating to assessments heretofore made must be construed as a restrictive clause in the title, and limiting the operation of the limitation statute to assessments made prior to its passage, and thereby rendering unconstitutional, as without the scope of the title so restricted, that portion of § 155 of the act providing that the six months' statute of limitation might be invoked as to actions begun to avoid taxes and assessments thereafter assessed; and resulting in the contention that, as this assessment was some years after the passage of this act, there is no valid statute of limitation of actions barring attack on the special assessment in question. If we grant appellants' objection urged, that, because the title of the act refers particularly to assessments *heretofore made*, it is restrictive, we could easily arrive at his conclusion. But does it follow

that because the title mentions assessments "heretofore made," and does not specifically mention assessments to be levied in the future, that the latter are not properly included within the purview of the act, and it is unconstitutional?

The contention of the appellants is of necessity based upon the assumption that the clause of the title concerning past assessments is so restrictive of the balance of the title as to exclude any legislation concerning limitation of actions as to future assessments being included under the portion of the title relating to government of cities, and germane to such subject but for such alleged restrictive clause. The title of the act in the main specifies the general subject of government of cities, and such portion relating thereto is a general title. The clause of the title referring to one of the hundreds of different subjects that might or are included in the legislation under the general title has reference to one particular limited matter, limitation of actions as to past assessments, but is also germane to the general title. We have, then, a general title with a subtitle concerning one matter germane to the general subject, that of government of cities. The lesser, the subtitle, cannot be said to restrict legislation on any other subject than the limitation of actions concerning assessments. It is in no sense generally restrictive of the general subject, government of cities. This narrows the investigation on the point raised, then, to the question of whether this subtitle concerning past assessments shall be construed as restrictive to legislation concerning limitation of actions as to assessments both past and future, so as to exclude legislation upon future assessments, when such legislation, both future and past, is germane to and within the general subject, organization of cities, and covered by the general title. If it appears from the title of the act that no other reasonable construction can be given thereto than that such clause was intended to, and the legislation thereunder enacted to, restrict the statute of limitations to past assessments, and as negating an intent that the body of the act shall contain legislation concerning limitation of future assessments, we must hold accordingly that the clause of the title mentioning past assessments is restrictive and exclusive, and voids that portion of the statute of limitations here involved. All necessary rules for the construction of the title and the determination of this question have been heretofore announced by the decisions of this court.

They have been summarized in an opinion by Morgan, Chief Justice, in *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703, upon the construction of this provision of § 61 of the Constitution: "This section of the Constitution has been construed by this court in several cases. In those cases several principles have been laid down as guides in the construction of the section that should be applied in this case: (1) The law will not be declared unconstitutional on account of the defect, unless it is clearly so; (2) the title should be liberally construed, and not in a strict or technical manner; (3) if the provisions of the act are germane to the expressions of the title, the law will be upheld; (4) the object to be gained by the enactment and enforcement of the constitutional provision is to advise the legislature and the public of the substance of the act, and to prevent surprise, fraud, and the enactment of laws upon incongruous and independent matters under one title; (5) the section of the Constitution is mandatory upon the legislature and upon the courts." As applied to the determination of whether an act is void because of a restrictive title, this is not the first case in this state in which the foregoing rules have been applied, as they were followed in *State v. Minneapolis & N. Elevator Co.* 114 N. W. 482, 138 Am. St. Rep. 691, 17 N. D. 23, from page 26 of which we quote: "In disposing of appellant's contention, we must be governed by certain well-established rules of statutory construction. among which are the following: A statute will not be declared unconstitutional unless in plain violation of some constitutional provision. Every presumption is in favor of the validity of a statute, and in case of a reasonable doubt as to its constitutionality, it is the duty of a court to sustain it." And on page 27 of that opinion, the court says: "The fact that the title of the act is somewhat restricting in its terms does not render the act void, as the provisions of § 2, which are not expressly referred to in the title, are, we think, clearly germane to the subject-matter embraced in the title. A reading of the title readily suggests that the body of the act might contain provisions similar to those embraced in § 2," which case collects all the decisions of this state up to that time construing § 61 of our Constitution. As before stated, the title to this act is singular, as is the subject. The mere mention in a statute of particulars or branches of the subject, which are or may be germane to the general title or main purpose,

does not make the title or subject plural. 1 Lewis's Sutherland, Stat. Constr. § 131, concerning which the authority says: "In such cases the legislature is not limited to the particulars or details specified, but may enact any provision germane to the general title, unless the title is so worded as to show a clear intent to confine the act to the particulars mentioned." And the same authority further says: "The question cannot be determined by regarding the title alone, but the body of the act must be looked to; and if all the provisions of the act are fairly referable to one general subject, and that subject is expressed in the title, the act is valid." Applying these canons of construction, can it be said that beyond reasonable doubt the legislature intended by the latter clause of this title to restrict legislation to the particulars mentioned in such clause, to the exclusion of similar legislation concerning future assessments? And does the clause itself show a clear intent that the title shall be so restrictive? Is it not as reasonable to conclude the contrary, when we consider that, under the general title, had this subtitle not been affixed, the legislature could have enacted, without contravening § 61 of the Constitution, a statute of limitations, if reasonable and otherwise valid, concerning both past and future assessments, and that, with this in mind, the subtitle was probably annexed not to narrow the scope of the legislation on the matter mentioned in the subtitle, but to bring to the attention of the legislature that the statute concerned past legislation in this particular, presuming that legislation concerning future assessments might be covered without mention, inasmuch as all legislation, unless the contrary appears, is to be considered in the prospective and with reference to its application to future as distinguished from past events? If such a construction is as reasonable as that contended for by appellants, or if appellants' contention is in this particular not the only reasonable conclusion to be arrived at, the statute as to future assessments must be upheld under the foregoing authorities. Our conclusion is that to recognize the contention of the appellants' as the one here applicable would be to construe this general title as unreasonably restricted by a subtitle, and this too in the absence of any clear intent derivable from the title and the act itself that it should be so construed. We cannot adopt the theory of the appellants, which seems narrow, unreasonable, and unduly restrictive, and a construction which might jeopardize much legis-

lation, past and future, by the precedent that would hereby be established.

We consider none of the cases cited by appellants as contrary to our conclusions, or as supporting their position. To briefly refer to them, counsel cites *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841; *Richard v. Stark County*, 8 N. D. 392, 79 N. W. 863; and *State ex rel. Standish v. Nomland*, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85. In the first case cited, the title of the act designated defendants as the parties against whom attorney fees should be allowed in final judgment on drainage cases, while the body of the measure, in direct conflict with the title, designated defendants as the parties entitled to fees to be recovered of plaintiffs. The holding is merely that the court refused to hold that the word "defendants" in the title of the act was inadvertently used, and that, as the subject-matter of the body of the act and of the title could not be harmonized, the act was void. No question, was there involved as here, of whether a subtitle restricts legislation under the general title in the particulars covered by the subtitle. In *Richard v. Stark County*, the substance of the holding was that a title, "To Increase the Revenues of the State by Changing or Increasing the Boundaries of the Counties of Billings, Stark and Mercer," could not be used as a subterfuge under which to accomplish the real object, that of a change of county boundaries and to increase the area of counties. Likewise, *State ex rel. Standish v. Nomland* is a holding that, "because the subject of the act is not expressed in the title," the act was void under the provisions of the Constitution under consideration. *Megins v. Duluth*, 97 Minn. 23, 106 N. W. 89, from Minnesota, wherein that court held the title of an act, requiring notice of claim to cities in actions for personal injuries received on the streets and highways, was not broad enough to include provisions in the statute itself relative to injuries other than personal injuries, was but drawing a distinction clearly outlined in the authorities concerning the subject-matter mentioned in the title of the act, and holding the legislation in the body of the act should be limited to the proper subject-matter. There is a well recognized distinction between claims for injuries received on highways by travelers and highway users, and claims for damage arising from consequential injuries to other persons than such users. The rule of law is that persons receiving consequential

injuries, as damages to abutting property occasioned by the repair of highways, are not covered by the legislation mentioned in the title of the act in *Megins v. Duluth*, concerning claims of damage to travelers because of obstruction to the highways, or injuries resulting therefrom because of the use of the street or highway for highway purposes. This case but recognizes a distinction already drawn in this state in *Gaustad v. Enderlin*, 23 N. D. 526, 137 N. W. 613.

Nor does § 179 of Cooley's Constitutional Limitations, to the effect that "the legislature may make the title to an act as restrictive as they please," and that "courts cannot enlarge the scope of the title when plainly restrictive," here apply, our holding being simply that a subtitle concerning the application of a statute of limitation as to past assessments is not restrictive of the general title, or of legislation concerning limitation of actions as to future assessments under the general title, and germane to the general subject of the government of cities, unless the intent shall be clear and plain that it shall be construed as restrictive. The legislature has here enacted no legislation under a restrictive title, but instead under a comprehensive title concerning a broad subject. We cannot enlarge the scope of the title under the authority cited by appellants, and above referred to; and it must follow that we certainly cannot do the contrary, narrow its scope. It is a question of the construction to be given, concerning which each title must be construed by itself under general rules, on the main with liberality, but not to the extent of rendering the constitutional provisions nugatory; or, as is said in the comprehensive note to *Bobel v. People*, 64 Am. St. Rep. 72: "The alleged insufficiency of the title should be tested candidly and justly, and a liberal interpretation given," and that, as also decided by our own court, "in construing the titles of laws, statutes must be held constitutional unless they are clearly void," citing abundant authority.

Appellants have on rehearing urged this statute as unconstitutional on the grounds that "to sustain the special assessment, according to the opinion herein, would be to deprive plaintiffs of their property without due process of law, contrary to the 14th Amendment to the Constitution of the United States, and the plaintiffs claim the protection and benefit of said amendment;" the answer to which is that appellants have had their day in court in an opportunity to object to the

assessment at the time they were by notice cited to appear and offer objections thereto, which hearing so afforded constitutes due process of law in the taking by special assessment of real property for such purposes. *Soliah v. Cormack*, 17 N. D. 393, 117 N. W. 125, appealed and affirmed in 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103, where the Federal Supreme Court there answers finally this question of appellants in the following language: "Neither does that Amendment [speaking of the 14th Amendment] invalidate an act authorizing an appointed board to determine whether the proposed drain will be a public benefit, and to create a drainage district consisting of land which it decides will be benefited by said drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the landowner before the assessment becomes a lien against his property."

The judgment is accordingly affirmed.

STATE EX. REL. DAKOTA TRUST COMPANY v. STUTSMAN
et al.

(139 N. W. 83.)

Prohibition to board of railroad commissioners — appeal — moot question.

1. Where prohibition proceedings are brought to restrain the board of railroad commissioners, created by the statute of this state, from acting in alleged usurpation of powers in questioning the sufficiency of bonds given by the grain elevators under § 2247, Rev. Codes 1905, for the protection of the patrons of such warehouses, and from inquiring into the settlements made by the surety or bonding company with the creditors of an insolvent warehouse, and such bonds have expired by lapse of time before the appeal is heard, such appeal will not be ignored as a moot question, the matter being one of public interest and the real matter in controversy being the authority and power of said commission.

Board of railroad commissioners — investigation of complaints against grain elevators — power to compel attendance of witnesses.

2. Under § 2247, Rev. Codes 1905, which requires operators of grain elevators

Note.—The writ of prohibition is the subject of an extensive note in 111 Am. St. Rep. 929.

to file with the board of railroad commissioners a bond running to the state with good and sufficient sureties to be approved by such commissioners and conditioned for the faithful performance of their duties as public warehousemen, and under § 2242, Rev. Codes 1905, as amended by chapter 230 of the Laws of 1909, and which, among other things, gives to the board of railroad commissioners the power "to investigate all complaints of fraud or oppression in the grain trade of this state and correct the same," such board may examine into the sufficiency of such bonds, both as to the form and the general business, conduct, and reliability of the sureties, and for such purpose may summon any witnesses before them that they please. Whether they can, in such cases, by court procedure or otherwise, compel the attendance of such witnesses and require testimony under oath is a matter not here determined.

Jurisdiction of board of railroad commissioners — over sureties on bond of elevator company.

3. In passing upon the sufficiency of bonds furnished by the elevator companies, or the necessity of requiring new bonds, the jurisdiction of the board is over the elevator companies rather than over the bonding companies or sureties. It has therefore no right in case of a controversy between the ticket holders of an insolvent elevator company and a surety or bonding company, to summon the said bonding company before it and threaten to cancel its bonds unless it so appears and makes satisfactory settlement with the said ticket holders. It may not seek by such means to force a settlement. It may, however, inquire into the transaction for the purpose of satisfying itself as to the business reliability of said bonding company, and if dissatisfied with the good faith or business methods of said surety, require other bonds to be given by the elevator companies.

Mandamus or prohibition to board of railroad commissioners.

4. While passing upon such bonds and performing such duties, such board is acting in a quasi judicial capacity, and cannot be controlled in the exercise of its discretion by mandamus or prohibition.

Board of railroad commissioners — approval of bonds of surety company.

5. The mere fact that a surety company has been licensed by the insurance commissioners to do business within the state of North Dakota does not authorize such company to compel the approval of its bonds by the board of railroad commissioners if sufficient as to form and amount, if such commissioners are dissatisfied with the business habits or conduct of the surety, or, for any other similar reason, believes the bonds to be insufficient.

Mandamus — prohibition — who may apply for writ.

6. Mandamus cannot be brought by the surety on a bond to compel the acceptance or continued approval of such instrument. If proper at all the proceeding should be brought by the principal, and not by the surety. The same is true of the writ of prohibition when sought to be obtained to prevent

a board which is vested with the power of approval, from disapproving its said bonds.

Opinion filed November 23, 1912.

Appeal by defendants from a judgment of the District Court for Burleigh County, *Winchester, J.*, awarding a writ of prohibition enjoining them from an alleged abuse of discretion in the matter of bonds furnished by public warehousemen in support of elevator licenses.

Modified.

Statement by BRUCE, J. This action was originally brought in the form of a petition for a writ of prohibition against the board of railroad commissioners of the state of North Dakota to prohibit them from exercising what is claimed to be usurped and unwarranted powers. The petition alleged, among other things, that the plaintiff was a corporation duly authorized to carry on the business of a surety company in the state of North Dakota; that one Samuel Kittler was from on or about the 17th day of September, 1909, continuously until on or about the 20th day of December, 1910, engaged in the business of operating a public grain warehouse at Turtle Lake, in the county of McLean; that in order to comply with the laws of said state he had procured the petitioner to execute and deliver to the board of railroad commissioners a bond which in all things complied with the laws of this state; that while said Kittler was engaged in conducting said business he issued sundry storage tickets to divers persons; that on or about the 20th day of December, 1910, he became insolvent; that thereupon the petitioner bond company, with the utmost diligence and good faith, sought to ascertain the persons to whom it had become liable on its bond before mentioned and the amount of its liability to such persons; and that upon obtaining such information it immediately set about to adjust its liability, and "promptly paid to each of said claimants the amount or sum of money which each of said claimants agreed to accept in satisfaction of his or her claim, save two claims, both of which are still in dispute; and that it stands ready at all times, and is able and willing, to pay the holders of said unsatisfied claims whatever amount may be found to be justly due; that in the course of

its investigation it discovered that many of the storage tickets were false, and that said warehousemen had falsely and fraudulently, and with the intent to cheat and defraud said petitioner, misstated the quality of the grain received by him; that by reason of the frauds aforesaid, such petitioner had disputed its liability for the face value of such false and fraudulent storage tickets, and had compromised the respective claims, with the exception of the two before mentioned, for less than their face value; that on or about the 3d day of May, 1911, the defendant board of railroad commissioners, without any authority or jurisdiction, served upon said petitioner a writing and purported order in words and figures as follows, to wit: "In the matter of the claims of holders of storage tickets against Samuel Kittler, of Turtle Lake: The Commission, having investigated the same, finds that all tickets owned by the petitioners are valid, and should be paid in full without discounting or scaling; it is further found that the Dakota Trust Company, the sureties on the elevator bond of the said Samuel Kittler, has, without just cause, compromised many of the claims of said ticket holders at 50 cents on the dollar. It is therefore ordered that the said Dakota Trust Company do and is hereby directed to pay said claims in full to the holders of said storage tickets within thirty days from the date of this notice." That said petitioner ignored and refused to obey said order, and that theretofore and on the 13th day of June said board of railroad commissioners served upon said petitioner a notice or citation and copy of resolution in words and figures as follows, to wit:

In compliance with a resolution adopted by the commission on Saturday the 10th inst., a copy of which I am sending you, I am writing you, giving notice that your company will be required to appear before the commission on Saturday, June 24th, to show cause why all the bonds issued by your company in support of elevator licenses shall not be canceled.

Please acknowledge receipt of this letter and the copy of the resolution and oblige.

(Signed) Respectfully yours,
The Board of Railroad Commissioners.
By Thomas Hall, Secretary.

Attached to this notice, as before stated, was a copy of the following resolution: "In the matter of the failure and neglect of the Dakota Trust Company to comply with a certain order issued by the board of railroad commissioners, requiring them to redeem certain warehouse receipts and to make settlements with the holders thereof; said receipts having been issued by Samuel Kittler, of Turtle Lake, doing business as a public warehouseman and whose license is supported by the bond of the said Dakota Trust Company. Be it resolved, that the secretary be instructed to notify and require the Dakota Trust Company of Fargo to appear before this commission at its office in the city of Bismarck on the 24th day of June, 1911, at 2 o'clock in the afternoon of said day, and show cause, if any there be, why the commission should not cancel the bonds of the said Dakota Trust Company, given in this state, to wit: [Here follows the names of thirty elevator companies.] Because of its failure to effect a settlement satisfactory to this commission with the holders of certain warehouse receipts issued by Samuel Kettler, of Turtle Lake. Be it further resolved: That the secretary notify and require each of the above-named elevator companies or warehousemen to secure and have ready on said date of June 24th, new bonds or undertakings satisfactory to this commission, to take the place of the said Dakota Trust Company's bonds, in the event they are then ordered canceled by this commission. Done at Bismarck, North Dakota, this the Tenth day of June, 1911."

The petition further alleged that such petitioner had in all things complied with the requirements of the law to do business in the state of North Dakota as a surety company, and was, at the present time, surety on the several warehousemen's bonds mentioned in said notice and resolution; that such petitioner had received and was entitled to receive large sums of money as compensation for the assumption of the several risks; that such petitioner was informed and believed that said defendants intended to, and would unless prohibited by the court, assume to exercise the pretended and unwarranted powers which they unlawfully assumed under said notices and resolutions, and would, on the 24th day of June, 1911, assume to cancel said bonds, and require said warehousemen to procure and furnish other sureties, and refuse to accept such petitioner's bonds for said warehousemen or other warehousemen, and thereby deprive such petitioner of a large portion of its

lawful and rightful business, and thus wantonly and unlawfully bring such petitioner into disrepute, to its great and irreparable loss. It further alleged that it had never in any manner consented or agreed to the assumption of such unwarranted power or authority of said defendants to hear, try, and determine the merit or validity of the claims before mentioned, and that the pretended findings of such board were wholly unwarranted and false. The petition then prayed for a writ of prohibition prohibiting said defendants "from further proceedings in the exercise of their usurped and unwarranted powers aforesaid, and commanding them to forthwith cease and refrain from their unlawful acts and conduct aforesaid, and that this court thereupon render judgment that all the acts and proceedings of said defendants in the premises are null and should be held for naught, and for such other and further relief as to the court may seem just." To this petition a return or answer was filed, which admitted the giving of the notices and the passage of the resolution, and a part payment of the claims by the petitioner. It, however, denied that the storage tickets or any of them were falsely and fraudulently issued, and on the contrary claimed that the amount of grain therein receipted for and stated to have been received was of the grade and quality and quantity as alleged, and further stated that at the time of the insolvency of the said Samuel Kittler the said petitioner requested the said board to desist from taking any action to enforce its liability under its bond to the state of North Dakota, or to the holders of the said storage tickets, and that upon the making of such request said petitioner represented that the outstanding claims represented by said storage tickets were to be fully paid and satisfied; that thereafter the said trust company falsely and fraudulently represented "to each and all of the said several ticket holders that said Samuel Kittler, while engaged in his business as a public warehouseman, at the village of Turtle Lake, had engaged in irregular and illegal practices of such character that the said Kittler could be successfully prosecuted criminally for the crime of embezzlement, or some kindred crime, and that the charges for which he could be prosecuted were of such a nature and of such a number that if he were arrested, prosecuted, convicted, and sentenced for each and all of the crimes of which, according to said false and fraudulent representation, he, the said Samuel Kittler, was guilty, he would be sentenced to the

state penitentiary for a term of seventy-seven years; that said relator, by its agents and servants, further represented to the holders of said storage tickets, with intent to deceive and coerce and take unfair advantage of the said ticket holders, that unless each of them should accept 50 per cent of his claim under his storage ticket against the said Samuel Kittler, as payment in full by relator, and a discharge of its liability under its said warehouse bond, that said relator would cause the arrest of the said Kittler for each and all of the said alleged criminal offenses, and would cause his prosecution and conviction; that all of said ticket holders, save two, believing said false and fraudulent representations, so made by this relator, its agents and servants, desiring to protect the said Samuel Kittler against the humiliation and disgrace that would necessarily attend his conviction for said several criminal offenses, accepted 50 per cent of their several claims against relator, and discharged it from further liability therefor." The answer further alleges that the board of railroad commissioners were by law given full supervisory power and control over the warehousemen of the state, and that they had full power and authority to approve, reject, or cancel any and all bonds furnished or submitted by said public warehousemen. It further claimed that, in assuming to conduct the hearing before mentioned, it did not exceed the jurisdiction conferred upon it, and properly and lawfully took cognizance of the complaints of said ticket holders. To this answer a demurrer was interposed, alleging that said return did not "show any defense or any ground or reason for the withholding of the peremptory writ prayed for in the petition," and moving the court for an order directing the issuance of such writ.

On the 10th day of July, 1911, the trial judge entered an order to the effect that "a peremptory writ of prohibition be issued herein as prayed for in the petition, and the plaintiff have and recover its taxable costs and disbursements," and on the 19th day of July, 1911, a judgment was entered to the effect that "it is hereby adjudged and determined that the defendants, commissioners of railroads of the state of North Dakota and board of railroad commissioners of the state of North Dakota, be, and they are perpetually and peremptorily, prohibited and enjoined from in any manner attempting to execute or enforce the orders or resolutions or any part thereof made and adopted

by said defendant board of railroad commissioners on the 10th day of June, 1911, set forth in the petition and alternative writ herein as Exhibit D, same being in substance and to the effect that the relator herein show cause before said defendant board why its bonds or insurance contracts of and for certain public warehousemen should not be canceled in the event of the failure of said relator to comply with the orders and resolutions of said board theretofore made with respect to certain payments, settlements, and obligations of said relator as a surety on the public warehouseman bond of one Samuel Kittler; and said orders and resolutions were and are without the jurisdiction of said defendant board, and null and void; and that a peremptory writ of prohibition shall be issued by this court as prayed for in the petition herein." From this order an appeal was taken. Prior to the argument on the appeal, however, the bonds lapsed and expired. Counsel for the respective parties, however, entered into a stipulation, which, however, was not filed in the trial court or in this court, and which merely appears in the brief of counsel, to the effect that: "Whereas sundry elevator companies and grain warehouses have made application to the board of railroad commissioners for licenses, and have tendered warehouseman's bonds with the Dakota Trust Company as surety; and whereas, there is a difference of opinion between the said Dakota Trust Company and said board with respect to the power and jurisdiction of said board to disapprove, except as to form, a warehouseman's bond upon which a trust or surety corporation duly organized and authorized to make such bond is a surety; and,

"Whereas, it is desirous and important in the public interest that licenses should be issued forthwith to the applicants therefor above mentioned.

"Now therefore, it is hereby agreed between the said board of railroad commissioners and Dakota Trust Company that the board of railroad commissioners may tentatively approve the warehousemens' bonds of the Dakota Trust Company tendered with said application for licenses, and that such approval shall be understood and deemed to be only tentative; and if it shall hereafter be finally determined by the supreme court of the state of North Dakota that said board of railroad commissioners has the power and jurisdiction to disapprove or refuse to accept such authorized trust or surety corporation as a surety on such bonds, then it is agreed that the board of railroad commissioners

may, notwithstanding the tentative approval of the above-mentioned bonds, revoke such approval, and cancel and reject said bonds the same as if said bonds had never been accepted or approved.

"It is further stipulated and agreed that the Dakota Trust Company expressly concedes and admits, and will expressly concede and admit in any proceeding now pending or hereafter commenced to test in court the above-mentioned question of the extent of the board's discretionary power and jurisdiction, with respect to the disapproval of such bonds, that if the board has power or jurisdiction in the first instance to reject, disapprove, or refuse to accept as a surety on such warehouseman bond, a duly authorized trust or surety company which has authority to give such bond, then said board also has like power to withdraw its approval, and cancel and reject such a bond at any time after and notwithstanding such approval of the bond in the first instance; and such revocation of approval or cancellation may be made for the same reasons, and on the same grounds or evidence as would be sufficient reasons, grounds, or evidence to warrant the disapproval of it in the first instance.

"Dated at Grand Forks, North Dakota, this 25th day of October, 1911."

In the briefs of counsel, also, and upon the argument in the supreme court, it was also agreed that the case could proceed as if it were a petition for a writ of mandamus compelling the board of railroad commissioners to approve new bonds to take the place of those which had expired, and it was also conceded that the same rule of law would apply in the case of a mandamus to compel the acceptance of new bonds and a writ of prohibition to restrain the cancellation of those already given.

Engerud, Holt & Frame, for respondent.

Andrew Miller, Attorney General, and *W. H. Stutsman*, for appellants.

BRUCE, J. (after stating the facts as above). The stipulation entered into by the parties cannot be carried out by this court. The original proceeding was a proceeding for a writ of prohibition. No petition for mandamus was presented to the trial court, and to allow the proceeding to be converted into a proceeding for mandamus in this

court would be for us to assert an original jurisdiction, which the Constitution has not granted to us. As far, too, as the writ of prohibition is concerned, the question is now largely a moot question, the original bonds having expired. The questions involved, however, are of so great public interest, and the real merits of the controversy are still so unsettled, that we can and will consider the questions involved. *Boise City Irrig. & Land Co. v. Clark*, 65 C. C. A. 399, 131 Fed. 415; *Re Morgan*, 114 App. Div. 45, 99 N. Y. Supp. 775; *Re Kaeppler*, 7 N. D. 307, 75 N. W. 253; *People ex rel. Spire v. General Committee*, 25 App. Div. 339, 49 N. Y. Supp. 725; *Coleman v. MacLennan*, 78 Kan. 711, 20 L.R.A.(N.S.) 361, 130 Am. St. Rep. 390, 98 Pac. 283. We cannot, however, order the entry of any judgment on the theory of a mandamus proceeding, but on that of a proceeding for a writ of prohibition alone.

In considering this case we must bear in mind that it is presented by demurrer to the return or answer, and that, such being the case, the allegations of the answer must be accepted as true, no matter what the real facts may be, and no matter what merit there might be in the petition if it were considered alone. The arguments and briefs of counsel, however, so confuse the issues raised by mandamus and prohibition that we will discuss this case more or less from the standpoints of both proceedings.

This is not a case where the board of railroad commissioners has refused to approve bonds, and, in refusing to do so, has relied upon its belief that its exercise of discretion need not be accounted for, and that no reason need be given therefor, but a case in which the commissioners have justified their refusal in their answer, and have given reasons therefor. The petitioner trust company contends that the power and duty of the board of railroad commissioners are limited and confined by the language of § 2247 of the Revised Codes of 1905, which requires the warehousemen to file with the board a bond running to the state, "with good and sufficient sureties to be approved by such commissioners in the penal sum of not less than \$5,000, nor more than \$75,000 in the discretion of the commissioners, conditioned for the faithful performance of their duty as public warehousemen, and compliance with the laws of this state. . . . Such bond . . . shall be in a sufficient amount to protect the holders of outstanding tickets." It con-

tends that this statute makes it the duty of the board to examine and determine the sufficiency of the bond with respect to amount and form alone, and not with respect to the moral or other qualifications of the bondsmen. It further claims that since §§ 4455 and 4456 of the Revised Codes of 1905 permit trust companies to be sole sureties where the law would require two or more personal sureties, and § 4679 of the Revised Codes of 1905 requires certain deposits to be made by such corporations with the state treasurer, and that when the deposits have been made the state treasurer shall so certify, and § 4682, Rev. Codes 1905, provides that the state treasurer's certificate provided for in § 4679 "shall, until revoked, be conclusive evidence of the qualification of such corporation and of its authority to become and be accepted as such surety," and § 4459 of the Revised Codes of 1905 provides that the above-mentioned state treasurer's certificate shall be filed with the insurance commissioner, and that thereupon the insurance commissioner issues his certificate of authority to do business, and §§ 4690 and 4692 provide for supervision and examination of such companies by the insurance commissioner, and § 4464 of the Revised Codes of 1905 provides that such company shall be conclusively presumed to be sufficient surety on any risk within the limit of 10 per cent of their capital; in the case of a surety bond the only duty left for the board of railroad commissioners is to inquire into the form and amount of the bond, and whether or not the surety is authorized to do business, and whether or not the risk is within its limit, and that the financial and moral responsibility of the company within that limit is conclusively presumed. It claims that the board has no right to inquire into the moral character or the past dealings of the surety company, and that that matter is for the insurance commissioner alone, and that until he revokes the license of such company, the company must be conclusively presumed to have a good business character and to be abundantly responsible, and that its bond must be accepted by the board. It further contends that the board is expressly limited by § 2242, as amended by chap. 230, p. 333, Laws of 1909, which grants it the following powers: (a) To supervise the handling, weighing, and storing of grain and seed; (b) to establish rules and regulations (1) for weighing, (2) for management of warehouses; (c) to investigate complaints of fraud and oppression in the grain trade; (d) to correct such frauds or op-

pression so far as may be in their power; (e) to revoke warehouse licenses for cause upon notice and hearing. The board of railroad commissioners, however, contend that § 2247, Rev. Codes, 1905, requires the warehousemen to file with the board a bond running to the state, "*with good and sufficient sureties to be approved by such commissioners*" and that it is their duty to ascertain whether the bond is good and sufficient, and that a good and sufficient bond means a bond which is both given by a surety which is financially responsible and reliable, and which is accustomed to fair dealing, and that such bond must be sufficient to cover all losses. They claim that if the capital of the trust company is limited to \$100,000, as it is in this case, they are justified in holding, or, at any rate, have the right to hold, that such surety is by no means sufficient if the company has issued bonds within the state, or to the commission, amounting to many hundreds of thousands of dollars; and that it is for them to inquire into such sufficiency. They also insist that they have the right to inquire into the previous dealings and business methods of the surety. Counsel for the trust company insists that when the board seeks to inquire into the past or the previous transactions of the bondsmen, it is seeking to hear and determine the merits of the bondsmen's controversies with the beneficiaries under previous bonds, and the extent of its liability or the validity of its settlements with them, and in such case is assuming judicial functions which have not been intrusted to it, and which, by § 85 of the Constitution, belong exclusively to the courts. The board of commissioners in answer contend that it is in no way seeking to determine any rights or obligations, or to announce any judgment, but is merely seeking to ascertain whether the bond is good and sufficient or not, and that in such investigation it has the right to inquire into the past transactions of the surety and into their fairness. It also claims that § 2242, as amended by chap. 230, p. 333, of the Laws of 1909, vests in the board the power to investigate the complaints of fraud or oppression in the grain trade, and to correct such frauds or oppression so far as may be in their power; and that, in furtherance of such duties, it is not only their duty, but their power, to see that the bondsmen are reliable, both in financial sufficiency and in business integrity. Counsel for the bond company in reply insists that the approval of the bonds or the investigation of the sufficiency of the surety company or the

business customs of such surety, in no way refer to the *grain trade*, and are matters entirely apart from the same.

The powers which have been by statute conferred upon the board of railroad commissioners of North Dakota are quasi judicial. They belong to that twilight zone which lies between the ministerial or judicial, and the legislative, which it is so difficult to bound and define, but which it is nevertheless so necessary to recognize. Its recognition, indeed, is necessary to all scientific, social, and legal development. Such acts and duties are, it is true, often spoken of as being "ministerial," but this is only for the purpose of distinguishing them from the actions and duties which belong solely to the courts, and which cannot be either delegated by or taken from them. See *State ex rel. Gale v. Ueland*, 30 Minn. 29, 14 N. W. 58; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081. The term "ministerial," indeed, is generic rather than specific, and ministerial acts may be divided into two classes: (1) Those which are ministerial solely, and involve no judgment or discretion; and (2) those which are quasi judicial. To this latter class those now sought to be exercised by the board of railroad commissioners belong. *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; *Ramagnano v. Crook*, 85 Ala. 226, 3 So. 845. That such powers may be delegated to such board is now well established. *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Burke v. Collins*, 18 S. D. 190, 99 N. W. 1113; *Re Hoover* (D. C.) 30 Fed. 51.

Even where the duty to be performed is quasi judicial and involves the exercise of discretion on the part of the tribunal or officer, it is well established that mandamus will lie to compel such tribunal to take some action in the premises, and to exercise its judgment or discretion. In such cases, however, the function of the writ is merely to set in motion. It cannot be used to direct how the duty shall be performed or the discretion exercised, as such a use would amount to substituting the judgment or discretion of the court issuing the mandamus for that of the court or officer to whom it was committed by law. See 19 Am. & Eng. Enc. Law, 732 and cases cited: 26 Cyc. 158; High, Extr. Legal Rem. § 24; *Broaddus v. Essex County*, 99 Va. 370, 38 S. E. 177; *American Casualty Ins. & Secur. Co. v. Fyler*, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337, and notes thereto, and the notes to *Dane v.*

Derby, 89 Am. Dec. 728, 742; Decatur v. Paulding, 14 Pet. 497, 10 L. ed. 559. It seems, however, to be fairly well established that where it is clear that such judgment or discretion is abused and exercised arbitrarily or in a capricious manner, *as where the discretion is made to turn upon matters which, under the law, should not be considered*, mandamus will lie. (See 26 Cyc. 161 and cases cited; 19 Am. & Eng. Enc. Law, 737). There are, however, many dissenting decisions even upon this proposition, and many courts hold that mandamus will not lie to review such discretion no matter how unjustly or arbitrarily it may have been exercised. Shotwell v. Covington, 69 Miss. 735, 12 So. 260, and cases cited; Ramagnano v. Crook, 85 Ala. 226, 3 So. 845. A distinction, also, is quite generally made between those cases where the board relies, in its answer, upon the general presumption that it has properly exercised its discretion and those in which it seeks to justify its action and gives reasons therefor. The question for us to determine in this case is not whether, if the board had refused to give the reasons for its refusal to approve the bonds, this court would have interfered, but whether the reasons given for the refusal in the return to the writ show an arbitrary caprice and an abuse of discretion. We are inclined to believe that no abuse of discretion has been shown. The board was not, as counsel for the respondent suggests, trying merely a former dispute or seeking to put the appellant on trial for an alleged offense. They went, it is true, a little too far and had no right to attempt to force a settlement of prior claims. They were exercising in the main, however, their discretion merely, and giving reasons therefor. They were seeking both to have the claims of the depositors settled, and to ascertain whether the bonds offered were good and sufficient; and we believe that the inquiry in regard to this matter should involve the question of business custom and integrity as well as of financial responsibility, and that though it was for the insurance commissioner to say whether the trust company should do business within the state and could act as a bondsman at all, it was for the board of railroad commissioners who were intrusted by the statute with the duty of supervising the grain trade and protecting the ticket holders in the elevators, to exercise their discretion as to what bondsmen they should accept, and reject any or all if they either disliked their business methods or thought that they had written more bonds than their capital would warrant. Surely this

duty would be the duty expected of the directors of any corporation, and it would seem that the same duty and responsibility was placed upon, and should be intrusted to, the board of railroad commissioners. The respondents have, and had, the right to do business in North Dakota. They have no vested right, however, to do any particular kind of business with any particular person. Section 4455, Rev. Codes 1905, indeed, clearly intimates that no such corporation has, even though approved by the insurance commissioner, any inalienable right to do business within the state, but that its bonds must be first *accepted* and *approved* by the officers or boards to whom they are presented. Nor have they, or any other person, or corporation, by virtue of their permission to do business within the state, a vested right to recognition by the railroad commissioners, or by any other state board. That board can exercise its honest discretion, and it is responsible for the same solely to the people who have created it, provided that it does not interfere with any vested rights, which it has not in this case. The duties which under the statute are to be performed by the board while approving bonds are, as we before stated, quasi judicial and discretionary, and would not in any view of the law be subject to review by the writ of mandamus, except on a showing of a clear abuse of discretion. A purely ministerial act, indeed, is one which "a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468. We know that there are cases in which it is held that the mere approving and accepting bail after it has been fixed by competent authority is a ministerial act solely (*Ray v. Doughty*, 4 Blackf. 115); but in these cases the question whether the act could be delegated was considered, rather than the question as to whether it could be compelled. So, too, there is a wide difference between an individual, such as a clerk of a court with no supervisory power and no quasi governmental responsibility, and that of a railroad commission such as the one before us. There is little difference, indeed, between the powers and responsibilities of the railroad commission of North Dakota and those of the board of commissioners in the case of *State ex rel. Reynolds v. Tippecanoe County*, 45 Ind. 501, and in which the court held that mandamus would not lie to compel the granting of a liquor license

even though the statute prescribed the form of the application, and there was but little, if anything, for the commissioners to decide. Nor is there any material difference between the case at bar and the case of *Shotwell v. Covington*, 69 Miss. 735, 12 So. 260, where the court held that mandamus would not lie to compel the president of a board of supervisors to approve the bond of the clerk of the court.

A very suggestive case is that of *State ex rel. State Pub. Co. v. Smith*, 23 Mont. 44, 57 Pac. 449. In this case the statute provided for the letting of state printing contracts by the state board of examiners, of which the governor was a member. The act also provided that all contracts made by the board should be approved by the governor and state treasurer. The court held that the duty of such officers to approve a contract let by the board was not solely ministerial, but involved judicial discretion, and could not be controlled by mandamus. "The word 'approve,'" the court in its opinion says, "means 'to pronounce good; think or judge well of; admit the propriety or excellence of; be pleased with; commend.' (Century Dict. title 'Approve.')" The Constitution does not define the extent to which they must go in the investigation of the action of the board, nor does it require that they must act together or state any reason for their actions. Yet from the very fact that their approval is indispensable, under the Constitution, the conclusion is irresistible that their action is designed to be a check upon the action of the board. This is the implication from the terms used and the rule of construction, that every word of the instrument should be rendered operative. . . . If this be true, in the discharge of their duty they must use their judgment and discretion as to all matters into which the board could or should inquire. This includes not only the pecuniary responsibility of the bidder, but his judgment, skill, ability, capacity, and *integrity* as well. . . . The governor having a general knowledge of the affairs of the state, and presumptively being fitted by his superior qualifications to pass judgment upon the action of the board, it was thought proper by the constitutional convention that he should give the taxpayers the benefit of his judgment and discretion. The treasurer being in a position in which he is presumed to be especially informed as to the condition of the state's finances, it was thought proper to require the exercise of his judgment and discretion also; the ultimate purpose was by this system of

counterchecks to secure economy and prevent favoritism. *It is not for us to say whether the provision is a wise one or not.* These officers, acting within the sphere of their constitutional duties, *are accountable under their oaths to the people only*, just as are the individual members of this court, and *it is no part of our duties to inquire into their motives in withholding their approval* from the contract let by the board to the relator. If they have acted arbitrarily, if they have chosen to pervert the functions of their high offices to vile, partisan uses, or to the purposes of favoritism as is suggested by the allegations of the affidavit; we have no power to restore their consciences and to bring them to a sense of duty. The form in which they are to be judged is the minds and consciences of the people, whose servants they are and who alone can hold them responsible for the manner in which they perform their duties." See also *Oliver v. Wilson*, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757; *Ramagnano v. Crook*, 85 Ala. 226, 3 So. 845; *Swan v. Gray*, 44 Miss. 393; *State ex rel. Eaves v. Rickards*, 16 Mont. 145, 28 L.R.A. 298, 50 Am. St. Rep. 476, 40 Pac. 210.

We have examined the statutes relating to the duties of the insurance commissioner and of the board of railroad commissioners with some care, but we cannot agree with counsel for respondent that the duties of the latter board are confined merely to the ministerial act of seeing that the bond is sufficient in form, and that the action of the insurance commissioner, in admitting the companies to do business within the state, is conclusive as to their financial responsibility and business integrity, so that the railroad commissioners, and, on the same reasoning, every other state officer and board, will be compelled to accept them as bondsmen, no matter what their dealings in the past may have been, or no matter how much in excess of their capital stock and of their deposit with the state their obligations may be.

We believe, in short, that the appellants' contentions as to the power and prerogative of the board are in the main correct, but, as we have before stated, no mandamus proceeding is technically before us.

When we come to consider the question from the standpoint of a petition for a writ of prohibition, we must take as established the above propositions as to the general power of the board in approving and canceling bonds, but we are constrained to hold that in the case at bar it exceeded its powers. We believe that the board of railroad com-

missioners had no power to attempt to force the surety company to make a settlement with its creditors, nor to assume to itself the power of adjudicating what the amounts of those settlements should be. We believe, however, that the commissioners had the right, if they thought the bonds furnished by the elevators were insufficient for any reason, whether on account of the financial responsibility of the bondsmen or their lack of business reliability, to require new ones.

We also believe that under § 2247, Rev. Codes 1905, which requires operators of grain elevators to file with the board of railroad commissioners a bond running to the state, with good and sufficient sureties, to be approved by the commissioners and conditioned for the faithful performance of their duties as public warehousemen, and under § 2242, Rev. Codes 1905, as amended by chapter 230, Laws of 1909, and which, among other things, gives to the board of railroad commissioners the power "to investigate all complaints of fraud or oppression in the grain trade of this state and correct the same," such board could examine into the sufficiency of the bonds, both as to form and general business conduct and reliability of the sureties, and for such purpose might summon any witnesses before them, and make any reasonable investigations that they pleased. Whether they could, in such a case, by court procedure or otherwise, compel the attendance of such witnesses and require testimony under oath, is a matter not here determined. A surety or bonding company can, at any rate, hardly complain because, when complaints are made of its business dealings, and objection made to its further retention as a bondsman, it is given an opportunity to appear and to be heard.

It may be, in a clear case of fraud or collusion, that the bonding company would, in a proper proceeding, have some measure of relief, and that the courts would be willing to protect its rights under the contracts already entered into. A clear distinction, however, must be made between the bonding company and the elevator companies. The bonds were required by the statute to be furnished by the elevator owners, and not by the bonding company. The bonding company was a surety only. The elevator companies were required to furnish the bonds, and it was for them to make their own contracts. The board of railroad commissioners has, under the statute (§§ 2241 and 2247, Rev. Codes 1905) the power to require good and sufficient bonds, and

to pass upon the sufficiency of the bonds furnished to them by the elevator companies, no matter by what sureties signed, and, as a necessary incident to such power, to demand new and additional bonds if they become dissatisfied with those already given. We believe that they have these powers not only under the clause of the statute which imposes upon them the duty of approving the bonds, but also under the clause which gives them the power to prevent fraud in the grain trade. We certainly believe that under the latter clause they have the power to investigate all such matters. They may not, it is true, be able to compel the bonding companies to appear before them, but they have the right to make the inquiries. The dealings of the board are with, and their jurisdiction is over, the elevator companies, rather than over the bonding company. No one, we believe, would contend that a surety on an appeal bond or bail bond would have reason or right to object if a clerk of a court or a judge were to refuse to accept a bond on which he was a surety. The controversy would be between the appellant or offerer of the bond and the clerk, and not between the clerk and the surety. We believe that the board had no power to compel the appearance of the bondsman before it for the purpose of forcing a settlement with its creditors before a legal adjudication of its liability. It certainly had no power to threaten to cancel the bonds if it did not appear or settle with the ticket holders, on the basis that it, the commission, thought just. It had the power, however, to make reasonable inquiries to satisfy itself as to the sufficiency of the bonds furnished by the company, and fair play would require the giving of an opportunity to the trust company to explain its past dealings. The power of the commission extended at the most to insisting that the elevator companies should furnish new and additional bonds, and if such companies should refuse so to do, to revoke their licenses. We believe they had the power to investigate into the business methods as well as the financial responsibility of the surety, and that their reason for seeking to cancel the bonds which is given in the answer is a reason that the courts cannot declare to be without merit. Of course, if the petition is true, another aspect is put upon the case; but we must remember that it is the answer or return that we are considering, and that all of the allegations of the answer are admitted by the demurrer. The answer, in short, charges the surety company not only with bad faith, but with

seeking to compound numerous felonies. We can hardly say that such charges, if sustained, against the surety, would not justify the requirement of new bonds. We do not say that the surety company is guilty of the felonies charged. We merely say that the answer so charges, and that the truth of the answer is admitted by the demurrer.

We resolve the main and real question in controversy in favor of the appellants, and hold that the board of railroad commissioners has the power and authority to examine into the sufficiency of bonds issued by the elevator companies, as to form, as to amount, and as to the general reliability and business methods and previous good faith of the bondsmen. In the exercise of their legitimate discretion in these matters, they cannot be controlled by mandamus, prohibition, or any other proceeding; nor can they be compelled to accept and approve as sureties persons or corporations of whom they disapprove. For good faith in such matters they are responsible to the public, and not to the sureties.

Such being our conclusion, it follows that the judgment of the district court should be modified. That judgment was as follows: "Is is hereby adjudged and determined that the defendants, commissioners of railroads of the state of North Dakota and the board of railroad commissioners of the state of North Dakota, be, and they are, perpetually and peremptorily prohibited and enjoined from in any manner attempting to execute or enforce the orders or resolutions, or any part thereof, made and adopted by said defendant board of railroad commissioners on the 10th day of June, 1911, set forth in the petition and alternative writ herein as Exhibit D, the same being in substance and to the effect that the relator herein show cause before said defendant board why its bonds or insurance contracts of and for certain public warehousemen should not be canceled in the event of the failure of said relator to comply with the orders and resolutions of said board theretofore made with respect to certain payments, settlements, and obligations of said relator as surety on the public warehouseman bond of one Samuel Kittler; and said orders and resolutions were and are without the jurisdiction of said defendant board, and null and void; and that a peremptory writ of prohibition shall be issued by this court as prayed for in the petition herein." The resolutions of the board spoken of as Exhibit D in such judgment contain two

parts. The first was an order and resolution directing that the Dakota Trust Company appear before said board and show cause why the commission should not cancel the bonds of said trust company because of its failure to effect a settlement satisfactory to the commission with the holders of the warehouse receipts issued by said Samuel Kittler. This part of Exhibit D was beyond the power of the commission. In other words, the commission had no power to direct, or by threats or otherwise to force, a settlement between the trust company and the creditors of Samuel Kittler. The commission, on the other hand, had a perfect right, if they saw fit, and on account of their dissatisfaction with the business methods of the surety, to require the elevators to furnish new bonds, and the trial court should not have enjoined the board from carrying out that part of the order or resolution which was as follows: "Be it further resolved that the secretary notify and require each of the above-named elevator companies and warehousemen to secure and have ready on said date of June 24th new bonds or undertakings, satisfactory to this commission, to take the place of the said Dakota Trust Company's bonds, in the event they are then ordered canceled by this commission." The words, "ordered canceled," are, perhaps, unfortunate; and the words used should have been "in the event that new bonds are required by this commission." The substance of the resolution, however, was beyond criticism, and its real meaning is quite evident.

The cause, therefore, will be remanded to the district court with directions to enter an order prohibiting the board of railroad commissioners from ordering the Dakota Trust Company to appear before it, and show cause why the commission should not cancel the bonds of said trust company because of its failure to effect a settlement satisfactory to the commission with the holders of the warehouse receipts issued by said Samuel Kittler. Such order or judgment, however, is to contain no other provision or prohibition.

No costs or disbursements will be allowed to either party.

BURKE, J., concurs.

SPAULDING, Ch. J., concurring. I concur fully in the construction of the law announced in the opinion of Judge Bruce herein. While

doing so, I think it proper to add a few words in support of the conclusions. No department of our state government is more intimately related to the people and to their security in dealing with corporations than is the board of railroad commissioners. The Constitution of the state creates this board, but leaves it to the legislative assembly to prescribe their duties. That body in its wisdom has seen fit to impose upon such board, supervision of the grain trade. The legislative details regarding such supervision need not be further entered into. The services of the board of railroad commissioners in such connection, when honestly and intelligently rendered, are of inestimable benefit to the public, and furnish it much needed protection. Their duties relating to the supervision of the grain trade correspond in that line largely to the duties of the public examiner to supervise the conduct of the business of state banks, and the object of supervision of the two lines of business is much the same, yet in some respects the need of supervision over the grain trade is far greater than the necessity for supervision over banks. Under existing conditions in this state practically all farmers, and many other residents of the state, are compelled to have dealings some time during the year with public elevators, and a very large part of the income of the farmers of the entire state comes from public elevator companies or proprietors in exchange for grain deposited in or sold to such elevators. The small grain raisers especially are at the mercy of such companies or proprietors, and are entitled to protection of the state against fraud or irresponsibility on the part of the people to whom they must dispose of their grain. The amount handled in this manner undoubtedly aggregates, on the average, something like a hundred million dollars per year, and some years considerably in excess of that figure.

The legislative assembly has, wisely, in my opinion, made some provision for this much needed protection. Having in view the magnitude of the business, its vital relationship to the welfare of the state, the law intended to make provision for such protection should be given a liberal construction to the end that its purpose may not be defeated, and if its meaning is ambiguous it should be given such construction as will best permit the ends sought to be accomplished, and furnish most nearly the protection needed.

The order and judgment of the district court in this case went con-

siderably beyond its proper scope, and prohibited the board from exercising jurisdiction in matters which to me seem clearly within its powers. This furnishes, however, no reason for setting aside the judgment in so far as it prohibited the attempted excess of jurisdiction on the part of the board, which I think is limited to the cancelation of the bonds in question; and if it was intended to adjudicate upon the rights of the ticket holders in the Kittler elevator as against the bonding company, this was beyond the jurisdiction of the board, at least until the claims of such ticket holders should be established by a judgment of a court of competent jurisdiction. In fact, as it seems to me, the claims of the parties against the bonding company would first have to be established in a court of law. This is in accordance with the terms of the bond given, which, in this respect, is conditioned that the surety "shall pay all sums for which he shall be adjudged to be liable by any of the courts of the state of North Dakota by reason of the laws of said state or the rules or regulations of said board."

The learned trial court, however, did not limit the relief granted the surety company within the proper limits. It not only enjoined the board from attempting to enforce payment of the claims against the Kittler elevator and the surety company, and from canceling the bonds given by the surety company, but it even prohibited the board from citing before it the different elevator companies to show cause why they should not furnish additional bonds, and in fact from taking any steps in the premises.

Regarding the propriety of this court adjudicating upon the right or power of the commissioners to approve or disapprove bonds executed by surety companies authorized to do business in the state and offered by elevator proprietors, I apprehend that the law differs materially from the law applicable to the cancelation of bonds, and that the discretion which may be exercised by the board in rejecting or disapproving bonds is much broader than that possessed by it over the subject of cancelation of bonds previously approved. I, however, see no reason why the parties to a proceeding may not, for purposes of their own, waive the right to have their cause determined upon one phase of the law and submit it on another, whether the two may harmonize or not. The respondent in this case has, by express stipulation, in effect waived its right to stand upon the law applicable to

the cancelation of bonds, and consents that this court may determine this controversy upon the law applicable to the power of the board to approve or disapprove bonds. This may justify us in passing upon the power of the board in this respect, but it does not seem to me that it would justify a reversal of so much of the judgment of the district court as was proper when the case was there submitted, and before such waiver by stipulation was made, as is claimed by appellant. This appeal was submitted and argued by both parties, more with reference to the power of approval and disapproval, than on the power to cancel bonds; and we are passing upon the contentions of the parties as presented, and which were so presented for reasons which they thought furnished sufficient grounds for such argument and presentation, all involving the powers and duties of the board of railroad commissioners in relation to surety bonds offered by proprietors of public elevators.

Goss, J. (concurring in part and dissenting in part). The facts recited in the majority opinion are very much abbreviated, and in the conclusions therefrom laid down as the law of the case the writer can agree only as to part of the judgment ordered, believing that the judgment must be in all things unconditionally affirmed. Accordingly, the writer's understanding of the facts and conclusions of law applicable under all the contentions of respective counsel are set forth.

This proceeding arises on a petition and supporting affidavit for writ of prohibition asked by the petitioner, a trust company duly organized and existing as such under the laws of this state, against the board of commissioners of railroads of the state, seeking to prohibit action by them commenced for the avowed purpose of canceling the surety bonds filed pursuant to law with the commission and heretofore approved by them of over thirty different elevator companies, including many line elevator companies of this state, as principals on said warehousemen bonds with petitioner company as surety. Under the law, such bonds are exacted in amounts not less than \$5,000, nor more than \$75,000, for each elevator company to insure the redemption of warehousemen receipts, grain tickets, issued to the public dealing with such warehousemen. The bonds run to the state, with the board of railroad commissioners as the body whose approval must

be had, and with which said bonds are filed and deposited for the benefit of the public.

In the year 1910, one Kittler, operating an elevator, became insolvent, leaving outstanding claims in the form of unredeemed grain tickets or warehousemen receipts for grain received at his elevator. This petitioner was surety for Kittler in the sum of \$5,000, with surety bond approved by and on file with the board. On notification by the board the surety company requested the board to permit it to investigate Kittler's liabilities in such respect, and it did so, with the result, as it alleges, of finding fraudulent grain receipts in circulation issued by Kittler with the collusion of the persons dealing with his elevator and therein depositing grain for sale or storage. Thereupon the surety company effected a compromise with all ticket holders and creditors of Kittler to whom they were responsible, excepting two ticket holders. In compromising they paid 50 cents on the dollar in release of themselves as surety and Kittler as principal for said obligations. The remaining two ticket holders with whom settlement has not been effected are litigating with the surety company the question of fraud and collusion between themselves and Kittler and the validity of said warehouse receipts, in which litigation liability has not been determined by judgment. Some time thereafter, the board discovering that the surety company was not making payments in full to Kittler's creditors, but shaving the claims at 50 cents on the dollar, ordered the company to make payment in full to all ticket holders, including the two with which the litigation is in progress. This notice and order of the board was ignored, petitioner refusing to comply therewith, evidently considering it none of the business of the board as to how much was paid in compromise of the claims, or how the claims were settled, so long as they were settled with the creditors. The board thereupon investigated, and *ex parte* determined that the surety company was acting dishonestly and fraudulently in compromising with the various ticket holders, and assert that the surety company secured compromises and settlements under the threat of prosecution of Kittler, the elevator man, for embezzlement, in case it had to pay in settlement more than 50 cents on the dollar; and that the various creditors, out of consideration to Kittler, rather than cause him to be prosecuted, accepted one half in full payment of their claims. No action has ever been taken on the

bond of Kittler against the surety company, so far as appears from the record. Asserting that the petitioner as a bonding company acted dishonestly and fraudulently in the settlement of the claims with Kittler's creditors, and as a basis for action by it, the board by order cited petitioner to appear before it and show cause why, because of its course of dealing in such respect, all the warehousemen and elevator bonds for the many lines of elevators for which it was surety in this state should not forthwith be canceled; which order, if put into effect, would result in debarring this petitioner from the furnishing of surety bonds for elevator companies in this state. The order was directed against the surety company alone. The various elevator companies for which as principals it was surety were not cited nor proceeded against. More than a million dollars' worth of elevator bonds are thus sought to be canceled.

The obligations of the bond in the Kittler matter, and of all bonds involved, after reciting the reasons for their execution, read as follows: "Now, therefore, if the said Samuel Kittler shall faithfully and lawfully perform his duties as public warehouseman, and comply with all the laws of the state of North Dakota relative thereto, and the rules and regulations adopted by the board of commissioners of said state in connection therewith, and shall pay all sums for which he shall be adjudged to be liable by any of the courts of the state of North Dakota, by reason of the laws of said state or the rules or regulations of said board, then this obligation to become null and void, otherwise to remain in full force and effect." The first action taken by the board was by order served upon petitioner and reading: "In the matter of the claim of the holders of storage tickets against Samuel Kittler, of Turtle Lake: The commission having investigated the same, finds that all tickets owned by the petitioners are valid, and should be paid in full without discontinuing or scaling." "It is further found that the Dakota Trust Company, the surety on the elevator bond of said Samuel Kittler, has without just cause compromised many of the claims of said ticket holders at 50 cents on the dollar. It is therefore ordered that the said Dakota Trust Company do and is hereby directed to pay said claims in full to the holders of said storage tickets within thirty days from the date of this notice, May 3, 1911." This was the order, the ignoring of which brought down upon the head of

petitioner the following order, "To show cause, if any there be, why the commission should not cancel the bonds of said Dakota Trust Company given in this state, to wit:"—then follows an enumeration of the various elevator companies, in all over thirty; after which the reason for such action is designated as "because of its (petitioner's) failure to effect a settlement satisfactory to this commission with the holders of certain warehouse receipts issued by Samuel Kittler, of Turtle Lake. . . . And be is resolved that the secretary notify and require each of the above-named elevator companies or warehousemen to secure and have ready on said date new bonds or undertakings satisfactory to this commission, to take the place of said Dakota Trust Company's bonds, in the event they are then ordered canceled by this commission." Before the return day of said order, an alternative writ of prohibition was issued out of the district court. This writ was issued upon the petition reciting the foregoing matters and the history of the Kittler transactions, the good faith of the petitioner in all transactions in connection therewith, the alleged false and fraudulent action of Kittler in collusion with the holders of storage tickets, in that tickets were fraudulently issued in excess of the value of grain deposited with or sold to it and the knowledge thereof of the ticket holders, and its settlement in full of all claims excepting two, in litigation as hereinbefore set forth; the action of the board in excess of its jurisdiction and power and its resulting damage in property and business to the petitioner, and that no speedy and adequate remedy, except by writ of prohibition, exists to petitioner. Accompanying said petition is a copy of the bond in the Kittler matter and the resolutions and notices of the board served upon it, including the foregoing recited orders of the board.

To the alternative writ of prohibition, the petition and affidavits reciting the foregoing matters, the board made return in substance reverring the foregoing, except that they deny that the discounting of tickets was made in good faith, and allege the same was done with intent to cheat and defraud the holders of storage tickets in the Kittler matter, and done under coercion occasioned by threats of petitioner and its agents to prosecute Kittler criminally if the offered compromises were not accepted; and that, because of said coercion and to avoid criminal prosecution of Kittler, said compromises were made at 50 cents on the dollar of actual liability of the surety and principal

to the holders of the tickets. "Defendants further allege that as the board of railroad commissioners of the state of North Dakota they are by law given full supervisory power and control over the public warehousemen of the state, and that they have full power and authority to approve, reject, or cancel any or all bonds submitted or furnished by said public warehousemen. That in assuming to conduct the hearing upon the right of relator to further continue as a surety upon the several bonds named in Exhibit "D" (the list of thirty-two elevator companies whose bonds with relator as surety are sought to be canceled) attached to relator's petition, by reason of the oppressive methods by it employed in forcing the holders of the storage tickets issued by said Samuel Kittler to make settlement, defendants did not exceed the jurisdiction conferred upon them as the board of railroad commissioners of the state of North Dakota by law, and properly and lawfully took cognizance of the complaints of said ticket holders against the unlawful and oppressive methods employed by relator in effecting said settlement and securing its discharge," and allege that the facts set forth in relator's petition are insufficient in law to warrant the granting of said writ. To this return plaintiff "demurs upon the ground that the allegations of said return do not show any defense or any ground or reason for the withholding of the peremptory writ prayed for in the petition; and the plaintiff now moves the court for an order directing the issuance of the peremptory writ of prohibition as prayed for in plaintiff's petition;" which was granted and the peremptory writ of prohibition issued accordingly. Respondents appeal from the order and judgment entered thereon. The judgment was entered on July 19, 1911, by the clerk of the district court, and the appeal taken by the board on January 17, 1912. Some three months after the entry of the judgment appealed from, and on October 25, 1911, the board of railroad commissioners, by its president and the attorneys for the petitioner and respondent herein, entered into a stipulation. Appellants have briefed under the assumption that this stipulation changes the nature of the issues involved, and transforms the prohibition proceedings in the lower court into a mandamus proceeding and issue in this court. This stipulation is as set forth in full in the majority opinion.

To arrive at a foundation from which to proceed, we brush aside this stipulation as so much *débris*. This action is before this court as an

appeal from the granting of a peremptory writ of prohibition. As the action was cast in the court of original jurisdiction, so must the action remain in this court for the exercise of appellate jurisdiction in that action. To hold otherwise would be to here assume original jurisdiction in matters other than as authorized by the Constitution. Appellants are here on appeal from the judgment rendered below and in that prohibition proceeding, and the case cannot be regarded, notwithstanding the stipulation, as a mandamus proceeding. The same form of proceeding is before us, carrying the same issues for determination and review on appeal as were before the trial court; and counsel cannot, by stipulation, materially alter either the form of action or the issues tried below. The stipulation was not settled as a part of the record on appeal, and it could not have been, as it was no part of the trial record, but is a matter subsequent to judgment appealed from. Whatever may be the subsequent act of the commission under said stipulation, it must be something separate and apart from the judgment to be awarded in this case. As such it may be the subject-matter of another action, but with that we have no concern. It may be true, as we learn from the stipulation and reasons therefor in the briefs, that the particular bonds sought to be canceled and against which this writ of prohibition appealed from is leveled, have expired and new bonds have taken their place, executed by the same principals and surety, but that does not change the subject-matter before us, nor render the case moot. As we view it, it is not those particular bonds that constituted the subject-matter of this action, but instead, any bonds given by this surety for said elevators that may be canceled by this board. In other words, if the board had the right to cancel those bonds they have the right to cancel the succeeding bonds now existing in lieu of the former, and executed for the same purposes, and under the same law requiring them. Besides, a public question is involved, and that alone, under the authorities, in the discretion of the court, may be considered and taken as sufficient to warrant determination where the judgment of the court will operate upon the subject-matter and its decision be other than the determination of an academic question. The same issue is alive and before us in all of its phases now as was presented to and was before the trial court, and the judgment of this court will operate upon the rights and liabilities of

the parties hereto on the bonds involved the same now as on trial below. Accordingly we should determine the issues in this prohibition proceeding in precisely the same manner and on no different issues than those that were before the court of original jurisdiction.

The board of railroad commissioners exists by constitutional authority authorizing it and for the performance of such duties as the legislature may impose upon it. Recognizing the public nature of the grain business as outlined by the common law, branding the business of public warehouseman as that of a public or quasi public nature, the legislature has seen fit, in its control of public agencies and utilities, to place the control of the public warehouseman business of this state in the hands of the board of railroad commissioners, and its right to do so and the right of the legislature and the board to reasonably regulate said business is unquestionable. *State ex rel. Stoesser v. Brass*, 2 N. D. 482, 52 N. W. 408, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857. And it is equally settled that the acts of this board in such particulars, including the approval or cancelation of bonds of warehousemen, though involving discretion, are administrative, and not judicial, in character. We are dealing, then, with judicial review of the administrative acts of an administrative board. In such review the question first arises: Was said board, in the proceedings to cancel these bonds, acting within the scope of the duties conferred upon it by law? As to this we conclude that as to the right to cancel the bonds of public warehousemen in appropriate proceedings for that purpose and upon valid grounds for cancelation they have the right to act. The power to exact security and approve the same by necessary implication carries with it the power to cancel insecure or insufficient surety or bonds. But do the pleadings disclose the right to here act and on the grounds here asserted for such action? And if such action is found to be erroneous and jeopardizing plaintiff's rights, is it subject to review and correction by this proceeding in prohibition? We will first investigate the reasons alleged by the board actuating it in its proceedings taken.

We first observe that the order is a separate and wholly independent matter from that in which arose the provocation, namely, the settlements made by this relator in the small Kittler matter. In that proceeding again we inquire by what right does this board assume to it-

self the power to, in an *ex parte* matter, investigate, determine, and adjudge the regularity of dealings of a surety for the principal, the warehouseman, with the principal's creditors in the matter of the adjustment by the surety of the principal's obligations to those creditors, and, indirectly, the settlement thereby of the surety's obligations to said creditors? And here we may appropriately state that the relation existing between Kittler and this relator was that of principal and surety, and with Kittler's creditors as the beneficiaries, and with the bond to the state for the protection of the creditors of Kittler. See § 47, Rev. Codes 1905, as amended by chap. 251, Sess. Laws 1911. No pecuniary interest is conferred upon the state by the bond. It runs to the state, because the warehouseman is engaged in a public business, and to that extent stands in somewhat the relation of a public officer to the state; and recognizing this public obligation, the state exacted the bond to protect not it, but Kittler's creditors. It has by law designated as its agent for the approval of the bond the body intrusted with supervision of the warehousemen's business in which Kittler was engaged. And it must be, under the statutory authority granted the board to supervise the grain business and prevent fraud and oppression therein, and correct the fraud and oppression where found (§ 2247, Rev. Codes 1905), that the right exists, if at all, for said board to control the acts of the surety company in settling its bonded obligation with Kittler's creditors and Kittler's obligation as principal to said creditors. Does, then, the statutory authority conferred upon the board to supervise the grain business, and prevent or correct fraud and oppression therein, extend to the right to supervise settlements by a surety of obligations incurred by a principal to third persons while said principal was engaged in the grain business? The answer to this is the determination of whether the surety thereby becomes engaged in the grain business, as by statute this board's authority cannot extend beyond the grain business, either to regulate it as a business or to prevent fraud or oppression therein. On this we must conclude in accord with the facts that the surety company is a bonding company to respond to liability, and is not engaged in the grain business either incidentally or at all. As to this we must take judicial notice of the surety business, of the various statutes exacting surety bonds, among which might be cited § 405, Rev. Codes 1905, requiring surety com-

pany bonds of county treasurers, for instance, on their qualifying for office, and furnished under similar statutes and for the same purposes as are bonds required in this case, as a protection to the public. We know that the public, in exacting such security, does it for the same purposes as does the bank exact bonds of its cashier, against defalcation or embezzlement; namely, as a business precaution. It would be absurd to claim that this bonding company, if it may happen to be on bonds for a score of county treasurers of this state, was in the county treasurer business as a business, or that because it may be found surety for a hundred banking institutions that it is in the banking business; and equally absurd, and to our minds farfetched, is it to claim that, because this company is bondsman for a principal engaged in the warehouseman business, that it is in the business of such principal, and as such subject to the control of the administrative body controlling in a general way the business of the principal. To so assert would furnish precedent for a board of county commissioners to claim the right to control, to a degree, any bonding company who stands surety for county officers; or would likewise confer upon the banking board of this state the right to control, as engaged in the banking business, a surety on a banker's bond. The statement of the proposition exposes the fallacy of such reasoning. We conclude, then, that this petitioner, as Kittler's surety, was not engaged in Kittler's business, and did not therefore come within the purview of the statute authorizing this board to control said bond company, because forsooth it could regulate Kittler's business as a public warehouseman. Instead, we find the law exacting the bond has determined the conditions of the bond. And these conditions are of simple liability to the creditors of Kittler. The surety company has by its bond agreed that it will pay, not any claim that any creditor may assert that Kittler as a warehouseman owes or may be liable for, but that it as a surety company "shall pay all sums for which he (Kittler) shall be adjudged to be liable by any of the courts of this state," by reason of the laws of the state or the rules or regulations of the board promulgated under and in accordance with those laws. So that, according to the very terms of the bond, the liability is not fixed thereunder nor owing until judgment is entered in some court. And no procedure is known whereby judgment can be entered in the name of any person other than the creditor, the ticket

holder or his assignee. Until the liability became such in fact by judgment, no legal duty rested upon this surety company to distribute its money among Kittler's creditors. That it did so in advance of judgment against its principal creditors is a matter not within the cognizance or concern in any way whatsoever of this board. They could as well claim the right under the statute to investigate the government of China, as to do as they did, *viz.*, entertain complaints from Kittler's creditors, after he had become bankrupt and had ceased the grain business, and investigate and determine Kittler's liability to them, and in advance of judgment in court call upon and demand the surety to pay according to their extra-legal *ex parte* findings as to liability. With no authority to investigate, they had no right to make an order, based upon the result of their investigations. In so proceeding they were not acting as an administrative board on matters within the grain trade, but assuming to themselves power over matters determinable only by judicial proceedings. They have assumed to exercise the creditor's right to invoke a determination of liability, seized hold of person and subject-matter without process of law, and, after so doing, exercised judicial functions and tried the matter before themselves; and as a result therefrom pretended to determine the legal rights properly ascertainable only in a court of law after trial between the creditor and his debtor, a principal, and his surety. A mere statement of this proposition brands it as extrajudicial and void, and as wholly beyond the power of any administrative board or officer under our system of government, wherein such judicial power is vested only in the courts.

With no jurisdiction to assert over Kittler, his creditors, or these bondsmen on the disastrous termination of Kittler's venture in the grain business, it follows, as the night the day, that any conclusion or judgment or determination of the board as the result of said void proceedings can constitute in itself, as a finding or determination or result of a proceeding, no defense to this writ brought to restrain its action about to be taken upon such unlawful grounds, unless the writ itself, on other grounds, will not lie.

Under this head the board, *in the briefs, but not in the return to the writ*, asserts the right to cancel these bonds, because as individuals and as a board, from extraneous events happening in the Kittler case, they had become satisfied that this surety company is dishonest. That,

therefore, under their duties devolving upon them as public officers, they could not conscientiously allow the bonds already given to remain in force; and hence, in the exercise of their discretion and in the performance of their duties, they have a right to cancel by the wholesale the bonds on which the petitioner is a surety wherever found in the grain business. The assertion of this is the equivalent of claiming an arbitrary right, the right to act to the injury of others without the necessity of assigning reasons, or upon reasons as here assigned manifestly capricious. As above demonstrated there could probably be no finding of dishonesty in the acts of the company in the settlement with Kittler's creditors, inasmuch as no violation of the bond or the law in letter or spirit by the petitioner is shown. While as a business proposition the payment of claims under such circumstances by a surety company, without investigation to determine if fraudulent or fictitious, might be termed such recklessness and want of care on the part of a surety company as might warrant investigation of said surety company by the state banking board under whose supervision, inspection, and order to a large extent it operates, a board of co-ordinate power and responsibility as a state board in its sphere with that of the board of railroad commissioners in its, it is not necessary to discuss in this connection further than to say that the reasons given by the board upon which their distrust of this petitioner is alleged to be founded must, from the very nature of things, be ignored and treated as insufficient to warrant such conduct by the board if based on such grounds. And as an administrative board whose acts are reviewable by the courts in instances such as this, for it to assert the right to reserve to itself the power of cancelation of bonds, and give no reason therefor, is in effect to deny the right of court review. If this defendant, in reply to the order of court to cease or show cause why it should not cease such action, may assert by return we have acted because of this capricious reason given, which if you hold to be capricious and insufficient we then assert we have acted for reasons known to ourselves, but which we refuse to disclose, can be held to be a return or defense, it is the equivalent of asserting want of power in a court to review at all such matters in any event. This is the equivalent of asserting the right to act arbitrarily as well as capriciously, and above and beyond

judicial control in any event. To this doctrine we cannot subscribe. But now to further analyze these proceedings.

Too much emphasis cannot be given to the fact that this is not a case wherein the board defends or even asserts that it has instituted proceedings by its summary order to show cause because of any inadequacy of the bond or insufficiency in any respect of the bond and bonding company. No question is raised but what the bond is in proper form and given in strict compliance with the statute; nor do the commissioners return or assert, directly or indirectly, that this petitioner as a surety company is not able and sufficient to respond to its bonds if called upon to do so. Nor is there any fraudulent conduct on the part of this bond company asserted, because the very facts shown upon which we are asked to infer that the board may conclude that defendant company is fraudulent in the conduct of its business show absolutely the contrary; and that, instead this board has overstepped and attempted to exercise power without the vestige of jurisdiction so to do, and pursuant thereto has issued its void order directing the surety company to disburse promiscuously its money to persons without shadow of established legal claim thereto, and when the board have no authority whatever in such matter. The void mandate in excess of jurisdiction of this board, served upon this company May 3, 1912, ordered petitioner to pay these claims in full within thirty days. The order was rightfully ignored. Then follows an equally void order, wholly in excess of authority or jurisdiction, to the effect that inasmuch as you have not paid these claims in compliance with the previous void order of this board, show us why we should not cancel every warehouseman bond you have given the state. This is the substance of this lawsuit. Nothing more is involved. No justification for the acts can be made in law. None is attempted. The board themselves are not before us in a case where they are seeking to cancel bonds because of insufficiency of the bondsmen. And grant that previous business dealings may be considered as bearing upon the sufficiency of bondsmen, in order for such dealings to be any justification it must be asserted that, because thereof, they render the bond insufficient or at least unsatisfactory to the board. Such is not here asserted. The bald facts are plead, and on their face they show an utter want of legal justification for the act of the board beyond its jurisdiction. At no

place does the board assert that, because this bond company is surety on a million dollars' worth of bonds to the state, it believes the company has too much contingent liability as surety for it to pass as sufficient. True, the board in its brief attempts to so claim, but without basis under the facts established or its verified return to the writ. In a nutshell the defense in this case is summed up as being that we, the board, have ordered this surety company to pay Kittler's creditors in full, even though said company has settled with said creditors the principal's liability to them, and even though such order of the board is void for want of jurisdiction in the premises; but we, the board, have made that order, and you make those payments within thirty days. Upon your noncompliance we, the board, because of disobedience to that order, ask you to show cause why all the warehouseman bonds you have given the state should not be canceled. That sums up the case of the appellants, and anything in the briefs or otherwise injected into the case is beyond facts and tends to befog the issue. If prohibition does not lie under these circumstances wherein action without semblance of jurisdiction from the beginning is attempted by this board, that remedy never applies to any case. And that it does lie see 2 Spelling on Extr. Relief, § 1716, from which we quote: "The writ of prohibition is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising a jurisdiction with which it has not been vested by law." "The writ of prohibition lies only when the inferior court proposes to exceed its lawful jurisdiction as to the person or the subject-matter, or in the enforcement of its rulings in a manner or by a means not intrusted to its judgment or discretion." Grant that the board may, for insufficiency of bonds, cancel them; that does not divest the petitioner of the remedy sought under these facts, as clearly, in the enforcement of its void order without grounds cognizable in law, is it not, in the words of the authority, engaged "in the enforcement of its rulings in a manner or by a means not intrusted to its judgment or discretion?" Must it not act upon some legal grounds, or by acting in excess of jurisdiction must it not, at least, claim to be acting because of the insufficiency of these bondsmen in order to confer upon it jurisdiction to act at all? And nowhere in the return is there such a claim, but instead, it tacitly admits it is engaged in the enforcement of a void order by means amounting to

nothing but duress; and that it is concerned in nothing but the enforcement of the first void order, that constituting the only reason for its conduct. Again we quote from 32 Cyc. 604: "Although it has been held that the writ will not lie where an inferior tribunal in a cause properly within its jurisdiction purposes to exceed its powers, but only to restrain such a tribunal from usurping jurisdiction; yet the rule supported by the great weight of authority is that the writ will lie in all cases either of abuse or usurpation of jurisdiction by an inferior tribunal." Under this broad rule we may grant every claim made in counsel's brief, and consider the same as amending the return, and still the writ will lie in this case of manifest abuse at least, of jurisdiction, conceding that a jurisdiction existed to issue an order of cancelation of these bonds upon no ground whatever; which, by the way, is conceding much, to say the least. The writ should even then lie, because under the rule in 32 Cyc. 605, "If the inferior tribunal is assuming to act when it has not jurisdiction of the subject-matter of the proceeding, or if it has jurisdiction thereof, but is exceeding its legitimate powers in the particular matter, the writ will lie." In citing these relators to show cause before it why its surety bonds given the state in compliance with statute and accepted by the state under statutory authority should not be canceled, because of its disobedience of an order void because of being beyond the authority or jurisdiction of the board, it is in effect citing relator to show cause why its bonds should not be canceled without cause or reason therefor, and surely under such circumstances, conceding jurisdiction of subject-matter and of persons, it is, in the words of the authority, "exceeding its legitimate powers in the particular matter, and the writ will lie." See also *McConiha v. Guthrie*, 21 W. Va. 134. But counsel may assert that the board had jurisdiction of the subject-matter and of the persons, and must then have had jurisdiction to determine its authority, jurisdiction to err, and that in so doing, if it errs, it is not a sufficient usurpation of judicial authority to warrant the writ of prohibition. *School Dist. v. Burris*, 84 Mo. App. 654, at 663, answers this very contention in the words of *State ex rel. Dawson v. St. Louis Ct. of Appeals*, 99 Mo. 221, 12 S. W. 661, that "it cannot be said that the writ will be issued only in those cases where the lower court has no jurisdiction whatever over the case before it. . . . 'The province of the writ is

not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but it is also extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject-matter in controversy, has exceeded its legitimate powers.' High, Extr. Legal Rem. § 781. Especially is this true where there is no remedy by appeal. The remedy by prohibition lies when the matter or cause in which the court is acting does not fall within the classes of which the law gives it jurisdiction, or when it acts in excess of its jurisdiction. . . . The writ of prohibition is applicable whenever jurisdictional functions are assumed which do not rightfully belong to the person or court assuming to exercise those functions. It is the nature of the act which determines the propriety of the writ. The writ is as available to keep a court within the limits of its power in a particular proceeding as it is to prevent the exercise of jurisdiction over a cause not given by law to its consideration." The nature of the act here about to be done by this board determines the propriety of the writ. From it we find that, although the board may have authority to cancel bonds for insufficiency or for other grounds properly cognizable by it, it is here proceeding without cause, without grounds, and hence without right, and there is no appeal or adequate relief from its usurped power when executed. In further illustration of this rule see the recent case of *West Virginia C. Gas Co. v. Holt*, 66 W. Va. 516, 66 S. E. 717, the holding of which is expressed by the syllabus as follows: "Prohibition lies to prevent the enforcement of an unauthorized judgment for costs rendered by a circuit court, notwithstanding the said circuit court may have jurisdiction to pronounce judgment upon the merits of the action." As in the case before us, the order for cancellation is but the enforcement of a void order made without semblance of jurisdiction. Under this authority the writ must lie. For similar cases, see subject "Prohibition," *Century Dig.* §§ 37 to 56; and *Decen. Dig.* § 10. But we have authority from our own state conclusive of this question. See *State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 107 N. W. 191, wherein a district court was held subject to the writ of prohibition where, by injunction, it wrongfully restrained the operations of a drainage board in proceedings wherein the board had the right to act, and wherein, in the absence of allegations of fraud or other ground of equitable interference, its action was con-

clusive. The application for injunction recited none of such grounds for equitable interference, and this court granted the writ upon the grounds of an excess of jurisdiction on the part of the lower court, although, concededly as a court of general jurisdiction and upon proper grounds, it would have had jurisdiction to restrain such proceedings. Because the grounds upon which the injunction was granted did not confer jurisdiction of the particular matter in that particular action upon the district court, although it concededly ordinarily would have had jurisdiction of the parties by service of its process and by law of the subject-matter, because as a court of general jurisdiction it had equitable jurisdiction to issue the injunctive order. Nevertheless, because of such excess of jurisdiction and the absence of a plain, speedy, and adequate remedy in the ordinary course of law, the writ of prohibition was granted. The court there shows the distinction between a lack of jurisdiction from the beginning in the proceedings and an excess of jurisdiction after jurisdiction in the proceedings had been regularly acquired.

See also *Zinn v. District Ct.* 17 N. D. 128, 114 N. W. 475, wherein the principle announced by the decision is by the syllabus given as follows: "The writ of prohibition is not a writ of right, but is available only when the inferior court, body, or tribunal is about to act without any jurisdiction or in excess of jurisdiction." In the course of the opinion the court quotes with approval § 1716 of *Spelling on Extr. Legal Rem.* heretofore cited.

The foregoing rule is also announced in the following words from 16 Enc. Pl. & Pr. 1095: "It [prohibition] issues to an inferior court when such court exceeds its jurisdiction in a cause of which it may take cognizance no less than when it has no jurisdiction whatever."

Appellant has briefed as though this were an action to test the right of the board to disapprove these bonds, and that such right to approve was not controllable by mandamus. This is in line with the stipulation which we have disregarded for reasons heretofore explained. This proceeding is in prohibition to prevent a cancellation of bonds heretofore approved. The act of approval, whether it be considered as involving discretion to the extent of being a judicial or quasi judicial act, or instead be classified as a ministerial act according to the conflicting authorities, is something nowise analogous to the cancellation

by arbitrary action without reason, or upon grounds manifestly capricious of bonds theretofore approved, and under such approval presumed sufficient in fact. Nor do we determine the question of whether the board may disapprove as insufficient a warehouseman's bond given by a surety company of this state. This question is in no wise involved, as the return, as heretofore stated, does not raise any question whatever concerning the sufficiency of the petitioner surety company.

As to the propriety of this particular writ, no point is made that certiorari, instead of prohibition, should have been invoked; and the rule that certiorari is allowable only after final judgment would answer such a contention. See Spelling, Extr. Legal Rem. § 1894. By the time cancelation of bonds would in form be effected and a foundation laid for the execution of new bonds of these principals, any relief otherwise available by certiorari would be inadequate, because too late and as after the resulting changed status of the parties, and the right to a writ of prohibition would then be jeopardized by the completion of the act that should have been stayed. So, if this be treated as a proceeding to cancel the bonds, the writ should issue, or if it be treated instead as an extrajudicial proceeding to compel compliance with a previous wrongful and void order made without jurisdiction, it should then issue. Whether the proceedings sought to be prevented are wholly without the jurisdiction of the commissioners from the beginning as to subject-matter and person, or whether it be assumed that the board, on proper grounds, may so act and is here acting on subject-matter within its jurisdiction, but without grounds upon which to assume jurisdiction of such subject-matter and of the parties, it is equally true that then likewise the writ should issue.

One further matter requires consideration. Has the petitioner the right to maintain this action? It is brought by this surety for many principals, without those principals before the court, for whose acts it stands sponsor in these proceedings. But the rights as between the surety and principals are not in litigation. The issue here is as to the power of appellant board to deny petitioner its right to be surety on warehousemen's bonds. In asserting such power, the commission asserts the right to deprive petitioner of the premiums coming to it from its satisfied principals, its property accruing to it under its contracts with principals as its customers. Perchance the principals may

not care, and may everyone consent, under stress of circumstances and the coercion of this board with supervisory power over them, that every bond in question may be canceled. That but illustrates that as to the relief sought the principals are not necessary parties, and the want of necessity of action through them. Every right of petitioner here involved is determinable in this action between it and the board. And petitioner alone is the real party in interest. Under the issues as here framed, there then exists no reason on that score why petitioner should be denied justice. The main opinion suggests that petitioner stands in a position similar to a surety on an undertaking to keep the peace, or to a surety on the bond of a defendant in a criminal prosecution, and that, as in those instances petitioner would not be heard to assert a property interest, he should not here be heard so to claim. It is pretty hard to imagine any property interest arising out of a criminal prosecution. Such is as distant from it as is the nature of the obligation at bar different from such a bond as well as the object to be accomplished in such proceedings. There is no similarity. In the case before us, where surety bonds are required, possibly amounting to millions, to be furnished by someone to principals for a premium or consideration to be paid therefor by the principal, with bonding companies whose incorporation is provided for by statute for the very purpose, we do not go far afield to see a benefit or property resulting to the bonding company. Not that it has any vested right as against the state, but that it has the right to be protected as an artificial person in the enjoyment of whatever rights it may have as against capricious and unwarranted, and therefore wrongful, acts of a state board, resulting to its detriment. To this extent it has the same right as has any person, and the fact that an administrative board as an agent of the state seeks wrongfully and without ground to expel it from transacting business within the state, to which it is equally entitled with every other person, is sufficient grounds for it to seek the courts for protection in its rights and property and to guarantee it the right to be heard.

The board have acted in good faith in all their proceedings, but that does not alter the fact that they have assumed to exercise powers they do not possess. Consequently this action is maintainable by this petitioner; that the action of the board is reviewable when manifestly in

excess of its jurisdiction as in this case, and hence its action being arbitrary and capricious and to petitioner's damage, and petitioner being the real party in interest, the peremptory writ of prohibition should issue in the suit of the petitioner as prayed for, and the judgment of the lower court should be, in all things, unqualifiedly affirmed.

Justice FISK concurs fully in the foregoing opinion.

McCULLOCH et al. v. BAUER.

(139 N. W. 318.)

Contract for sale of real property — dependent covenants.

1. The covenants of a contract for the sale and purchase of property, wherein the vendors, for a stated consideration, agree to furnish the vendee with abstract for property sold, and to give to him a warranty deed for the same, and the vendee agrees to pay the purchase price on completion of inventory, construed and held to be dependent covenants.

Dependent covenants — parol evidence of modification.

2. In an action by the vendors against the vendee to recover damages for breach of a contract to purchase and pay for certain personal and real property, under which contract the covenants to sell and deliver title thereof, and to receive and pay for the same, are mutual and dependent covenants, *held*, that evidence of an oral modification or waiver by the vendee of the vendors' covenant to convey at the time designated in the contract was inadmissible for reasons stated at length in the opinion.

Sale of real property — covenant as to warranty deed and abstract of title — waiver.

3. A covenant by vendors to furnish to the vendee an abstract of title, together with a warranty deed for the property agreed to be sold, imports an undertaking on the vendors' part to convey a marketable title; and such covenant is in no way affected by the fact that the vendee had knowledge

Note.—The authorities on the question of the ability of a vendor to perform, as condition precedent to his enforcement of right to rescind or declare forfeiture, are discussed in a note in 3 L.R.A.(N.S.) 103.

On the question what constitutes "satisfactory title," within requirement of land contract or other agreement relating to land, see note in 18 L.R.A.(N.S.) 741. And as to what is marketable title, generally, see extensive note in 38 L.R.A.(N.S.) 3.

that the vendors' title was defective, or that they had no title; nor can such knowledge on the vendee's part be construed as a waiver by him of the binding force of such covenant.

Contract for sale of real property — parol evidence to vary.

4. In an action to recover damages as aforesaid, *held*, that evidence tending to show a parol agreement or understanding by the vendee to accept a warranty deed from plaintiffs with existing defects in the title is inadmissible as tending to contravene the well-settled rule that the terms of a written contract cannot be varied or contradicted by parol.

Contract for sale of real property — parol evidence to vary.

5. Evidence of conversations between the parties relative to the defective condition of plaintiffs' title, *held*, inadmissible for the purpose of showing an oral modification of the written contract. Under § 5382, Rev. Codes 1905: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." Such statutory rule applied in the case at bar.

Action for breach of contract by vendee — vendor's ability to perform.

6. In an action by a vendor to recover damages for a breach of a contract by the vendee, it is incumbent upon the former to establish by competent proof that, prior to the commencement of the action, he was ready, able, and willing to fully perform on his part, notwithstanding the fact that the vendee had informed the vendor of his inability to carry out the contract on his part.

Opinion filed December 5, 1912.

Appeal by plaintiffs from a judgment of the District Court for Stutman County, *A. G. Burr*, Special J., in defendant's favor in an action brought to recover damages for breach of a contract to purchase certain property.

Affirmed.

Knauf & Knauf, for appellant.

Defendant having refused to complete the deal on the ground that he "could not raise the money" to make the payment precludes him from thereafter raising or attempting to raise other objections or reasons for his failure to perform. *Johnson v. Oppenheim*, 55 N. Y. 291; *Morris v. Sliter*, 1 Denio, 59; *Mattock v. Kinglake*, 10 Ad. & El. 56, 2 Perry & D. 343, 8 L. J. Q. B. N. S. 215, 3 Jur. 699; *Donovan v. Judson*, 81 Cal. 334, 6 L.R.A. 593, 22 Pac. 682; *Harmon v. Thompson*, 119 Ky. 528, 84 S. W. 572; *Wasson v. Palmer*, 17 Neb. 330, 22 N. W. 774; *Schwartz v. Woodruff*, 132 Mich. 513, 93 N. W. 1067; *Converse v.*

Blumrich, 14 Mich. 120, 90 Am. Dec. 230; Pike v. Butler, 4 N. Y. 360; Kenyon v. Knights Templar & M. Mut. Aid Asso. 122 N. Y. 247, 25 N. E. 299.

Seiler & Aylmer and Thorp & Chase, for respondent.

Vendor was to convey a marketable title. Warvelle, Vend. & P. § 419; 39 Cyc. 1442; Greenwood v. Ligon, 10 Smedes & M. 615, 48 Am. Dec. 775; Easton v. Lockhart, 10 N. D. 181, 86 N. W. 698; Brandenburg v. Phillips, 18 N. D. 200, 119 N. W. 543; Justice v. Button, 89 Neb. 367, 38 L.R.A.(N.S.) 1, 131 N. W. 736; Howe v. Coates, 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397; Brown v. Widen, — Iowa, —, 103 N. W. 158; Godfrey v. Rosenthal, 17 S. D. 452, 97 N. W. 365; Younie v. Walrod, 104 Iowa, 475, 73 N. W. 1021; Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981; Weaver v. Richards, 144 Mich. 395, 6 L.R.A.(N.S.) 855, 108 N. W. 382; 8 Words & Phrases, 7404; Weitzel v. Leyson, 23 S. D. 367, 121 N. W. 868; Sherman v. Beam, 27 S. D. 218, 130 N. W. 442; Davis v. Jeffris, 5 S. D. 352, 58 N. W. 815; Buswell v. O. W. Kerr Co. 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837.

In order to render evidence of a subsequent parol agreement admissible to vary the terms of a written contract, it is necessary that such subsequent agreement be founded upon a consideration. Swan v. Drury, 22 Pick. 489; 17 Cyc. 736 and cases cited; 1 Beach, Contr. §§ 777-781; Barnard & L. Mfg. Co. v. Galloway, 5 S. D. 205, 58 N. W. 565; Broads v. Mead, 159 Cal. 765, 116 Pac. 46, Ann. Cas. 1912 C, 1125; Robinson v. Yetter, 238 Ill. 320, 87 N. E. 366.

The seller should not be compelled to part with his property without receiving a consideration, nor the purchaser to part with his money without an equivalent in return. 1 Beach, Contr. § 89; Davis v. Jeffris, 5 S. D. 352, 58 N. W. 815; Lester v. Jewett, 11 N. Y. 453; Kane v. Hood, 13 Pick. 281; Swan v. Drury, 22 Pick. 485; Williams v. Healey, 3 Denio, 363; Grant v. Johnson, 5 N. Y. 247; Dunham v. Pettee, 8 N. Y. 508; Ink v. Rohrig, 23 S. D. 548, 122 N. W. 594; Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Glenn v. Rossler, 156 N. Y. 161, 50 N. E. 785; Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. ed. 219; Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210; Parker v. Parmele, 20 Johns. 130, 11 Am. Dec. 253; Howe v. Mitchell, 17 Me. 85, 35 Am. Dec. 231; Shinn v. Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Johnson v. Jackson, 27

Miss. 498, 61 Am. Dec. 522; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; 39 Cyc. 1307, and cases cited; *Ames v. Ames*, 46 Ind. App. 597, 91 N. E. 509; *Tripp v. Smith*, 180 Mass. 122, 61 N. E. 804; *Sennett v. Shehan*, 27 Minn. 328, 7 N. W. 266; *Jones v. Gardner*, 10 Johns. 266; *Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965; 1 *Warvelle, Vend. & P.* § 113, and cases cited; *World's Fair Min. Co. v. Powers*, 12 Ariz. 285, 100 Pac. 957; *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53; *Martin v. Roberts*, 127 Iowa, 218, 102 N. W. 1126; *Webb v. Hancher*, 127 Iowa, 269, 102 N. W. 1127; *Runkle v. Johnson*, 30 Ill. 328, 83 Am. Dec. 191; *Powell v. Dayton, S. & G. R. R. Co.* 14 Or. 356, 12 Pac. 665.

In order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform at a time when and under conditions such that he is or might be entitled to require performance. 2 *Warvelle, Vend. & P.* § 935, p. 1113; *Frazier v. Cushman*, 12 Mass. 277; *Hapgood v. Shaw*, 105 Mass. 276; *Godfrey v. Rosenthal*, 17 S. D. 452, 97 N. W. 365; *Ink v. Rohrig*, 23 S. D. 548, 122 N. W. 594; *Cornett v. Best*, 151 Mo. App. 546, 132 S. W. 35; *Daniels v. Newton*, 114 Mass. 533, 19 Am. Rep. 384; *Boulware v. Crohn*, 122 Mo. App. 571, 99 S. W. 796; *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 940; *Dosch v. Andrus*, 111 Minn. 287, 126 N. W. 1071; 2 *Warvelle, Vend. & P.* § 905; *Rev. Codes 1905*, § 6617; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* 61 L.R.A. 402, 58 C. C. A. 220, 121 Fed. 298; *Wood, C. & Co. v. Seurich*, 5 Cal. App. 252, 90 Pac. 51; *Cadwell v. Smith*, 83 Neb. 567, 120 N. W. 130; *Davis v. Jeffries*, 5 S. D. 352, 58 N. W. 816; *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 185; *Rev. Codes 1905*, §§ 5245, 5254; *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037; *Webb v. Hancher*, 127 Iowa, 269, 102 N. W. 1129; *Martin v. Roberts*, 127 Iowa, 218, 102 N. W. 1126; *Easton v. Lockhart*, 10 N. D. 181, 86 N. W. 702.

Where a contract, for any reason, is incapable of being enforced as against one party, it cannot be enforced as against the other. *Black Hills Nat. Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1073; *Brown v. Whiden*, — Iowa, —, 103 N. W. 158; *Justice v. Button*, 89 Neb. 367, 38 L.R.A.(N.S.) 1, 131 N. W. 736; *Kicks v. State Bank*, 12 N. D. 576, 98 N. W. 408; *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245; *Smith v.*

Taylor, 82 Cal. 533, 23 Pac. 217; Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 211.

When both parties are in default at the same time, neither can recover damages from the other. 2 Warvelle, Vend. & P. §§ 918, 925, 926; Kicks v. State Bank, 12 N. D. 576, 98 N. W. 408; Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 940; Reynolds v. Burlington & M. R. Co. 11 Neb. 186, 7 N. W. 737; Smith v. Cedar Rapids & M. River Co. 43 Iowa, 239; Bigler v. Morgan, 77 N. Y. 312; Dunham v. Pettee, 8 N. Y. 508; Chicago, B. & Q. R. Co. v. Cochran, 42 Neb. 531, 60 N. W. 894.

FISK, J. Plaintiffs, who are the appellants, brought this action in the district court of Stutsman county to recover from defendant and respondent damages in the sum of \$6,150 and interest, for the alleged breach on defendant's part of a written contract entered into between the parties, by the terms of which plaintiffs agreed to sell to defendant, and the latter agreed to purchase from the plaintiffs, certain real and personal property in the city of Jamestown. Such contract is not very lengthy, and we deem it advisable to set the same out in full in this opinion. It is as follows:

Jamestown, North Dakota, April 28, 1910.

This agreement, made and entered into this day by and between John McCulloch and C. F. Mudgett, copartners as McCulloch & Mudgett, parties of the first part, and Otto Bauer, party of the second part, witnesseth:

That the party of the first part hereby agrees to sell to the said second party, and the said second party hereby agrees to purchase from the said first party, the lumber and fuel business operated by them at Jamestown, North Dakota, together with all stock of lumber and fuel, all horses (4), wagons, harnesses, all office furniture and fixtures, engine, saw and splitter, together with the following described real estate: Lots 1, 2, 3, 4, 5, 6, 7, and 8, block 31, original plat of Jamestown, North Dakota, lot 10, block 67, Klaus's second addition to Jamestown, North Dakota, at the following prices: Lots 1, 2, 3, 4, 5, 6, 7, and 8, block 31, together with all sheds, horses, and machinery, office furniture and fixtures, wood machinery, for the sum of twelve thousand five hundred dollars (\$12,500).

24 N. D.—8.

Lot 10, block 67, as above, for the exact cost of said lot, together with the improvements thereon, this figure to be arrived at by bills to be submitted by John McCulloch. The stock of lumber to be sold and bought on the basis of the present wholesale list of same f. o. b. cars Jamestown, North Dakota, with 50c per M. to be added for handling; all other building material at the present wholesale price with handling charges added. All hard coal at \$8.50 per ton, and other coal at present wholesale price.

Said stock to be invoiced on May 2, 1910, and possession to be given immediately on completion of inventory and settlement.

Said second party agrees to pay for said business, real estate, stock, etc., as follows: The sum of two hundred dollars (\$200) on signing of this agreement; the balance of said purchase price on completion of inventory, except that the said John McCulloch hereby agrees to carry the sum of thirty-five hundred dollars (\$3,500) on lot 10, block 67, aforesaid, on a first mortgage, for the period of three years at the rate of 7 per cent per annum.

Said first party agrees to furnish said second party with abstract for property sold, and to give said second party a warranty deed for the same.

Said first party further agrees to guarantee the cost of moving coal shed, engine house, office, and lumber shed, to not exceed the sum of two hundred dollars (\$200), but reserves the right to cause same to be moved for this amount in case said second party cannot contract for this amount or less.

Said first party further agrees that the said second party shall have the option of taking such lumber as he shall decide on of the stock now purchased for the Jamestown yard, at the prices at which such material is bought, and said second party agrees to fill all unfinished estimates of said first party, at prices at which stock is sold him, said amounts to be deducted from inventory and duebill issued for same.

McCulloch & Mudgett, party first part,

By C. F. Mudgett.

Otto Bauer, party second part.

Witness, Erskine McCulloch.

Such contract is attached to the complaint and made a part thereof

by way of an exhibit, and it is in substance alleged in such complaint that plaintiffs have complied with the terms of said contract in every respect, and that prior to the commencement of this action they tendered to defendant a bill of sale of the stock of merchandise and other personal property, and a warranty deed, together with abstracts of title of all the real property, and they demanded from defendant the agreed consideration of \$41,325.93 cash, and that he execute and deliver to them a note and mortgage for the sum of \$3,500, as stipulated in the contract; and it is therein alleged that defendant neglected and refused to pay plaintiffs the sum aforesaid, or any part thereof, and that he refused to carry out the terms of such contract on his part. The answer admits the copartnership of plaintiffs and the execution of such contract, but denies the other allegations of the complaint. The answer then alleges, by way of separate defenses, a breach of such contract by the plaintiffs; fraud and fraudulent representations by them in inducing defendant to enter into the contract, and also a mutual mistake of fact avoiding the contract.

At the conclusion of plaintiffs' testimony, defendant's counsel moved for a dismissal of the action, which motion was granted. Thereafter judgment was entered dismissing the action, from which judgment this appeal is prosecuted.

Numerous assignments of error are set forth in appellants' brief, but it will not be necessary to notice them each separately. They relate principally to rulings of the court in excluding certain testimony offered by the plaintiffs tending to show a modification of the written contract, or a waiver by defendant of its provisions requiring plaintiffs to furnish marketable title to the real property at the time designated in the contract, and such assignments are discussed together in appellants' brief.

We are fully agreed that there is no merit in any of these assignments, and that the rulings complained of were correct in each instance, and the judgment must therefore be affirmed. Our reasons for such conclusion will be briefly stated.

While the written contract between the parties is very explicit, and discloses that the covenants to convey on the one part and to pay on the other part are dependent covenants, appellant sought to show at the trial an oral modification or waiver by defendant of plaintiffs' covenant to convey at the time mentioned in the contract, and this he

sought to show without any foundation in the complaint for such proof. The undisputed facts disclosed by the record are that plaintiffs did not have, even at the time of the trial in the court below, a merchantable title or any title to a portion of the real property which they agreed to convey, hence they were not in a position to enforce the contract as against this defendant, without showing such modification of the contract or waiver by him of its provisions in his favor. Appellants sought to show defendant's knowledge at the time of entering into the contract of the apparent defects in plaintiffs' title. Such proof was manifestly immaterial and irrelevant in the face of plaintiffs' covenant in the contract "to furnish said second party with abstracts for property sold, and to give second party a warranty deed for the same." It is well settled that such a covenant must be construed as requiring the vendor to convey a marketable title. *Warvelle, Vend. & P.* § 419; 39 Cyc. 1442; *Greenwood v. Ligon*, 10 *Smedes & M.* 615, 48 *Am. Dec.* 775; *Easton v. Lockhart*, 10 *N. D.* 181, 86 *N. W.* 698; *Brandenburg v. Phillips*, 18 *N. D.* 200, 119 *N. W.* 543; *Justice v. Button*, 89 *Neb.* 367, 38 *L.R.A.(N.S.)* 1, 131 *N. W.* 736; *Howe v. Coates*, 98 *Minn.* 385, 4 *L.R.A.(N.S.)* 1170, 114 *Am. St. Rep.* 723, 107 *N. W.* 397; *Brown v. Widen*, — *Iowa*, —, 103 *N. W.* 158; *Godfrey v. Rosenthal*, 17 *S. D.* 452, 97 *N. W.* 365; *Younie v. Walrod*, 104 *Iowa*, 475, 73 *N. W.* 1021; *Fagan v. Hook*, 134 *Iowa*, 381, 105 *N. W.* 155, 111 *N. W.* 981; *Weaver v. Richards*, 144 *Mich.* 395, 6 *L.R.A.(N.S.)* 855, 108 *N. W.* 382; 8 *Words & Phrases*, 7404; *Weitzel v. Leyson*, 23 *S. D.* 367, 121 *N. W.* 868; *Sherman v. Beam*, 27 *S. D.* 218, 130 *N. W.* 442; *Davis v. Jeffries*, 5 *S. D.* 352, 58 *N. W.* 815; *Buswell v. O. W. Kerr Co.* 112 *Minn.* 388, 128 *N. W.* 459, 21 *Ann. Cas.* 837.

Clearly defendant had a right to rely upon the express covenant of plaintiffs, even though he had knowledge that their title was defective, or that they had no title, and such knowledge on his part can in no manner be construed as any waiver by him of the binding force of such covenant. Even if the complaint had alleged such knowledge on defendant's part, and had even gone further and alleged a parol agreement or understanding that defendant would accept a warranty deed from plaintiffs with the existing defects in the title, such fact could not be proved, as the same would contravene the well-settled rule that the terms of a written contract cannot be varied or contradicted by parol.

Rev. Codes 1905, § 5333; Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241; Swan v. Drury, 22 Pick. 485.

In the latter case it was said: "The plaintiff offered to prove thereby that, at the time of the making of the contract, the defendants knew of the encumbrance on the same by the mortgage to Mrs. Jennison, and that it was then understood and agreed that the mortgage should remain thereon. This evidence would have had a tendency to vary and contradict the terms of the written contract, and had no tendency to prove a subsequent waiver of the exception to the plaintiff's title. It was therefore clearly inadmissible."

Appellants also sought to prove conversations with defendant during the taking of the inventory, relative to the defective condition of the title to some of the property, presumably for the purpose of showing a subsequent oral modification of this written contract. Such offered proof was clearly inadmissible for several reasons. First. No foundation was laid in the complaint for proving any such subsequent oral modification. Second. There was no consideration shown for any such modification. And third. Under § 5382, Rev. Codes 1905, it is provided: "A contract in writing may be altered by a contract in writing or by an *executed* oral agreement, and *not otherwise*." Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Reeves & Co. v. Bruening, *supra*, 13 N. D. 157, 100 N. W. 241. In Cughan v. Larson, *supra*, we quote the following from the third paragraph of the syllabus: "A written contract for the sale of real estate cannot be modified by an unexecuted oral agreement, although the modification pertains only to the performance of the contract." Moreover such offered proof was properly rejected, because under § 5332, Rev. Codes, an agreement for the sale of real property must be in writing and subscribed by the party to be charged or by his agent, and a contract required by the statute of frauds to be in writing cannot be modified or changed by a subsequent oral agreement or modification. This is well settled. Reiff v. Coulter, 47 Wash. 678, 92 Pac. 436; Downing Invest. Co. v. Coolidge, 46 Colo. 345, 104 Pac. 392; Bradley v. Harter, 156 Ind. 499, 60 N. E. 139; Grand Forks Lumber Co. v. McClure Logging Co. 103 Minn. 471, 115 N. W. 406; Culey v. Upham, 135 Mich. 131, 106 Am. St. Rep. 388, 97 N. W. 405.

As very tersely and correctly stated by respondent's counsel: "If

a contract required by the statute of frauds to be in writing could be modified by a subsequent, unexecuted, parol agreement, the whole object of the statute of frauds would be defeated. If the contract could be modified in one particular, it could be modified in every particular, and a new contract by parol substituted. This rule applies to the manner of the performance as well as to any other provision of the contract." See *Cughan v. Larson*, supra, 13 N. D. 373, 100 N. W. 1088; also *Lawyer v. Post*, 47 C. C. A. 491, 109 Fed. 512.

The theory of plaintiffs, both in their complaint and throughout the trial in the court below, was not that there had been a modification or waiver of the contract with reference to their covenant to convey a perfect title at the time of defendant's payment of the purchase price, but that the covenants of the parties were dependent, and that they were entitled to excuse nonperformance on their part by showing that defendant had knowledge of their inability to perform, and either expressly or impliedly waived such performance. They have apparently shifted their position in this court and assert the right to recover upon the theory of independent covenants. In other words, they here assert that defendant's promise to pay the purchase price of this property, amounting to about \$45,000, is wholly independent of plaintiffs' promise to convey a marketable title to the property, and for an alleged breach by defendant of his said promise, plaintiffs here assert a right to recover large damages, although concededly they are not able to comply with the covenant on their part to furnish title. Appellant's contention is manifestly erroneous. The covenants in the contract are clearly dependent, and plaintiffs have wholly failed to show a valid modification or waiver of the provisions of the contract in this respect. Hence, in order to prove a cause of action against defendant, it was incumbent upon plaintiffs to establish, by competent proof, the truth of the allegations of their complaint to the effect that they, prior to the commencement of this action, were ready, able, and willing to fully perform on their part. No such proof was offered, and the trial court therefore correctly granted defendant's motion for a dismissal of the action. *Shelly v. Mikkelsen*, 5 N. D. 22, 63 N. W. 210.

Appellants' counsel seem to labor under the belief that because of defendant's statement to plaintiffs of his inability to raise the money necessary to complete the contract on his part, that proof of such

breach was all that was necessary to entitle plaintiffs to recover damages in this action. This, however, is clearly not the law. To entitle them to recover damages for such breach, it was incumbent upon them to show that they were ready, willing, and able to comply with the contract on their part, for manifestly it would be unjust to hold the defendant liable in damages when he could not have enforced specific performance from plaintiffs. We have examined the authorities cited and relied upon by appellants' counsel, and we do not deem them in point. The correct rule governing this case seems to be well settled. Such rule is correctly stated and the authorities cited in support thereof in 39 Cyc. 1983, as follows: "A vendor, in order to recover for a breach of contract by the purchaser, must himself have been able and ready to perform his part of the contract, unless his inability was due to some act of the purchaser; . . . Notwithstanding the circumstances may be such as to obviate the necessity of an actual tender or offer of performance, this fact does not dispense with the necessity of an ability and readiness on the part of the vendor to perform." Citing *Bigler v. Morgan*, 77 N. Y. 312; *Booth v. Milliken*, 127 App. Div. 522, 111 N. Y. Supp. 791, affirmed in 194 N. Y. 553, 87 N. E. 1115; *Wells, F. & Co. v. Page*, 3 L.R.A.(N.S.) 103 and note (48 Or. 74, 82 Pac. 856); *Gray v. Smith*, 28 C. C. A. 168, 48 U. S. App. 581, 83 Fed. 824; *Langley v. Dauray*, 145 Mass. 325, 13 N. E. 908; *Godfrey v. Rosenthal*, 17 S. D. 452, 97 N. W. 365, and other cases.

In *Bigler v. Morgan*, 77 N. Y. 312, it was, among other things, said: "However positively a vendee may have refused to perform his contract, and however insufficient the reason assigned for his refusal, he cannot be subjected to damages without showing that he would have received what he contracted for, had he performed." Citing *Heron v. Hoffner*, 3 Rawle, 393, 400; *Bank of Columbia v. Hagner*, 1 Pet. 464, 7 L. ed. 222; *Traver v. Halsted*, 23 Wend. 66.

It follows from what we have above said that the judgment appealed from is correct, and the same is accordingly affirmed.

HEALD et al. v. STRONG.

(138 N. W. 1114.)

Appeal — statement of case — time for — extension.

1. Trial courts possess a broad discretion in the matter of granting or refusing extensions of time for the purpose of enabling counsel to prepare and cause to be settled a statement of the case, and the exercise of such discretion will seldom be interfered with by this court, and never except in cases of a manifest abuse of such discretion. It is held, applying the above rule, that respondent's motion to strike the statement of the case from the record, based upon the alleged insufficiency of the showings made for the various extensions of time in which to have such statement settled, should be denied, it not appearing that, in granting such extensions, there was a clear abuse of discretion.

Appeal — review of evidence — denial of new trial.

2. Where a motion for a new trial based upon alleged insufficiency of the evidence is made and denied after judgment, and no appeal from the order is taken, this court, following the rule in *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276, will not, on an appeal from the judgment, consider assignments based solely upon alleged insufficiency of the evidence.

Appeal — error in rulings on evidence.

3. Certain rulings in the admission and exclusion of testimony examined and held proper, or at least nonprejudicial.

On rehearing.

Appeal — sufficiency of evidence — how challenged at trial.

4. On an appeal from a judgment alone, the question of the sufficiency of the evidence is not properly before the court for decision, although attempted to be raised by an assignment of error, where the sufficiency of such evidence was in no manner challenged at the trial, but only by a motion for a new trial made long after the entry of such judgment.

Appeal — scope of review.

5. Section 101 of the N. D. Constitution, which provides that "every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefore concisely stated," etc., construed, and held not to require a literal compliance therewith. A point fairly arising upon the record, within the meaning of said section, must be one the decision of which is necessary to the final determination of the cause, and which is properly presented with a fullness and distinctness, rendering it possible for the court to comprehend it in all its bearings. Such is the well recognized and settled construction of like constitutional provisions.

Opinion filed October 4, 1912. On rehearing December 5, 1912.

Appeal by plaintiffs from a judgment of the District Court for Stuttsman County, *E. T. Burke*, J., in defendant's favor in an action on a promissory note.

Affirmed.

T. F. McCue, for appellants.

Knauf & Knauf, for respondent.

FISK, J. Defendant had judgment in the court below, and plaintiffs have appealed, both from such judgment and from an order denying their motion for a new trial. On motion of respondent the appeal from the order was dismissed upon the ground that the same was not taken within sixty days after the making and service of such order. Such order was made April 7, 1911, and a copy thereof served upon appellants' attorney on April 8th, and the appeal from such order is dated June 13th, and was served on June 15, 1911. The statute (§ 7204, Rev. Codes 1905) limits the time for taking an appeal from an order to sixty days from the time written notice of such order shall have been given to the party appealing. The appeal from such order was therefore ineffectual.

At the outset we are confronted with a practice questioned. At the date on which this cause was set for argument, respondent's counsel, on due notice theretofore given, made a motion in this court for an order striking the settled statement of the case from the record on the following ground:

"1. That the same was not settled within the time allowed by law.

2. That no just cause of action or reason existed for the extensions of time within which to prepare or settle the statement of the case.

3. That the appellants wilfully neglected to prepare the proposed statement of the case, or to settle the statement of the case within the time allowed by law.

4. That the extensions of time with in which to prepare or settle the statement of the case were improperly allowed, and that the extensions so granted were erroneous, because from the record it appears affirmatively that the failure to prepare or serve the statement of the case or have the same settled earlier was due to the wilful neglect of the said appellants."

The record discloses that the case was tried and judgment rendered in the month of June, 1910. The statement of the case was not settled until March 6, 1911. On August 31, 1910, appellants' counsel applied for, and received from the trial judge, an extension of sixty days from and after such date in which to settle a statement of the case. The showing offered as a basis for such order seems to have been sufficient and its sufficiency is not challenged.

Again, on October 25th, upon a similar showing, appellants' counsel applied for and received a further extension of such time of sixty days from and after such date.

Again, on December 5th, plaintiff presented an affidavit to the trial judge stating that he had just received an official transcript of the testimony from the court reporter, and also stating that the same is a large one and contains many exhibits, and that it will require a great length of time in which to prepare a proper statement of the case, whereupon an order was made extending the time for the period of ninety days from and after December 25th. Such order was filed on January 10, 1911, in the clerk's office.

Again, on the 24th day of February, 1911, another similar application was made for an extension of such time up to and including March 8, 1911, which was granted by the Honorable E. T. Burke, the trial judge, but who, in the month of January preceding, ceased to be the presiding judge in said judicial district and qualified as judge of this court. As a basis for such order appellants' attorney presented an affidavit stating, in substance, that immediately upon ascertaining the result of the verdict in said cause, he ordered a transcript of the evidence for the purpose of settling a statement of the case and of moving for a new trial; that on or about the 1st day of January, 1911, he received such transcript, which was the earliest date according to his best information and belief at which he could procure the same; that immediately thereafter he commenced the preparation of such statement, but that during a portion of such time his stenographer was called away on account of sickness, and that during a considerable portion of the time after the commencement of such work his family were seriously ill, which rendered it impossible for him to give his attention to such work, but that he had proceeded with due despatch and as rapidly as possible, completing the proposed statement on February 5, 1911,

on which date he served the same upon respondent's counsel, the latter accepting service thereof on February 6th. Thereafter, and on February 18, 1911, respondent's counsel served many amendments to such proposed statement, which required two days' time in which to examine and compare the original transcript therewith. He also stated that ten days' additional time was requisite in which to serve notice of an application to have such proposed statement settled. Thereupon an order was made by the said trial judge extending the time to March 8, 1911, in which to have such statement of the case settled.

Again, on March 8th, two days after such statement was settled, an application was made to the Honorable Charles F. Templeton, judge of the first judicial district, for an extension of such time to and including March 25th thereafter, which application was granted upon a showing substantially the same as that made to the Honorable E. T. Burke at the time the last extension was granted, and also setting forth the fact that at the time Judge Burke settled such statement on March 6th, objection was made upon the ground that no jurisdiction was vested in Judge Burke to grant such extension of time for the reason that he had at that time ceased to be the judge of the fifth judicial district, wherein such cause was tried, and a proper showing was also made that his successor, Judge Coffey, as judge of the fifth judicial district, was absent from the state.

At the time of the application for the settlement of the statement of the case, the following objection was made and overruled and an exception allowed, which objection was as follows:

"The defendant objects to the settlement of the statement of the case in the above entitled action, (1) because no proper extension of time has been granted by the judge of said court extending the time to or beyond March 6th, 1911, within which to prepare or settle such statement of the case; (2) no good cause in the interest or furtherance of justice has been shown under or by virtue of which the plaintiffs are entitled to the settlement of the statement of the case at this time, and no cause exists therefor; (3) that said statement of the case could readily have been settled long prior to the 1st of January, 1911, by the use of reasonable diligence. These objections are based on the records and files and the annexed affidavits.

"Wherefore the defendant prays that the motion of plaintiffs to settle the statement of the case be herein dismissed.

"Dated March 6th, 1911."

In support of such objections the following affidavits were presented by respondent's counsel:

"John C. Lowe, being first duly sworn, deposes and says that he was, during all the year 1910, the official stenographer of the fifth judicial district, and as such stenographer caused the taking of the testimony of the witnesses in the above entitled matter, by Miss Getrude McConnell, affiant's assistant. That Hon. T. F. McCue was one of plaintiffs' attorneys in said action. That said McCue told affiant, soon after the trial of said action, that he would want a transcript of the testimony in said action, and asked what the same would cost; that affiant caused said McCue to be immediately notified of the cost thereof. Some weeks later affiant met said McCue and he (McCue) informed affiant that he had forgotten the amount, and that if affiant would again notify him thereof he would send a check therefor. That affiant immediately notified him again of the amount, but did not hear from said McCue again relative thereto. That said McCue was informed by affiant, and well knew that affiant required payment for transcripts to be made in advance, as provided by statute. That said McCue did not furnish the payment, but on November 5th we received a letter from A. W. Heald in which he stated that he had received a letter from Mr. McCue asking that \$150 be sent to him to pay for this transcript, and Mr. Heald also said at that time (November 5th, 1910): 'I wish you to draw on us for the amount of this, and we will pay the draft.' On receipt of the letter, or soon thereafter, Miss McConnell commenced the transcript for the first time. On November 29th, 1910, we received another communication from Heald saying that McCue was no longer retained by them. We did not feel at liberty to write this transcript without having our fees in advance.

"That the only reason why said transcript was not prepared and sent plaintiffs or their attorney sooner was the failure of the plaintiffs to forward the money therefor in accordance with my rules, and § 484, Rev. Codes 1905.

"On November 5th, 1910, we wrote the plaintiffs the following letter:

"Replying to your letter of November 5th, will state that we require in all cases a deposit of the estimated cost before starting to write a transcript. Therefore, I have not started on the case of Heald & Kleinman v. Strong, but I think I can furnish you the transcript about the second week in December. As per your request, I am drawing on you to-day for the estimated cost of \$150.

"John C. Lowe.

"Subscribed and sworn to before me this 22d day of February, 1911.

"Omon B. Herigstad,

(Seal.)

"Notary Public.

"A. L. Knauf, being first duly sworn, deposes and says that a copy of the transcript of the evidence in the above entitled action was furnished affiant by the then court stenographer of said district on December 12th, 1910, and that the same could have been furnished affiant long prior to that date had the original thereof been ordered under the rules of said stenographer and the law of North Dakota relative to stenographers of the district court. That said action was tried and verdict rendered at the June, 1910, term of the district court of Stutsman county, North Dakota; that notice of entry of judgment was served on Hon. T. F. McCue, attorney for plaintiffs, on or about the 23d day of June, 1910. That at the same term of court, several days subsequent thereto, affiant tried a court case, McCurdy v. Williams et al., the same stenographer taking the testimony in said court case as took the testimony in the above entitled action; that no decision was rendered in the said court case until the last day of November, 1910; that affiant immediately ordered and secured a transcript of the testimony prior to December 12th, 1910, in such court case, and that such transcript contained at least seventy pages more of typewritten matter than that contained in the Heald and Kleinman v. Strong action. That, had the transcript been ordered and fees paid promptly by the

said plaintiffs, plaintiffs could have procured such transcript of testimony long prior to the 1st day of November, 1911.

“A. L. Knauf.

“Subscribed and sworn to before me this 4th day of March, 1911.

“John Knauf.”

No counter showing was made by appellants' counsel. On the foregoing facts we are called upon to decide the motion to strike such statement of the case from the record on this appeal.

While it appears from such showing that appellants' counsel did not proceed in the settlement of such statement with that degree of diligence which he could and perhaps should have proceeded with, still we are not prepared to say that the trial judge, as well as Judge Templeton, clearly abused the discretion vested in them in granting the various extensions of time. Trial judges rightfully possess a broad discretion in these matters, and the exercise thereof will seldom be interfered with by this court, and never except in cases of manifest abuse of such discretion. It does not appear that the delay was occasioned through bad faith or with any intent to gain an advantage over or to injure the respondent in any way, and in the light of the prior holdings of this court in such cases, we have concluded that the motion should be denied.

This brings us to the merits. Appellant has assigned thirty-one alleged errors, but in view of the rule announced in *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276, and cases therein cited, those assignments based upon alleged insufficiency of the evidence cannot be considered on this appeal, as these same matters were urged and passed upon on the motion for a new trial made after the entry of the judgment, and the order denying such motion, not having been appealed from, is, as to such objections, *res judicata*.

Assignments numbered 1 to 7 inclusive, and also all others not predicated upon alleged errors of law occurring at the trial, must be disregarded.

Before noticing the alleged errors of law complained of, a brief statement of the facts is deemed advisable. It is alleged in the complaint that on March 3, 1909, plaintiffs purchased certain land of defendant and the latter took a stock of goods in exchange therefor, and

that, as part payment for the stock of goods, defendant sold and delivered to plaintiffs a promissory note for \$1,422 executed by one Christianson and secured by a chattel mortgage covering an undivided one half of the crops to be raised during 1909 on certain described land. Plaintiffs first cause of action is predicated upon an alleged false and fraudulent representation by defendant that such chattel mortgage constituted the first and only lien upon such crops, whereas defendant in fact held a prior lien thereon by virtue of a lease or cropping contract between himself and Christianson, and that such prior lien rendered plaintiffs' security under such mortgage wholly worthless. They allege the insolvency of C., and that the note is and was of no value, but that it would have been worth its full face value had it been secured as represented by defendant. The answer puts in issue such alleged representations, and it is therein alleged that plaintiffs were fully informed of the existence of such prior lien held by him.

For a second cause of action plaintiffs allege that as to one quarter of the land sold by defendant to them there were 13 acres less than had been represented, and that, at the agreed price paid for such land of \$30 per acre, plaintiffs paid to defendant and he received from them the sum of \$390 more than he was entitled to receive. This is also put in issue by the answer.

By way of counterclaim defendant alleged that the stock of goods transferred to him by plaintiffs for such lands, note, and other consideration was, by plaintiffs, represented and warranted to be in a strictly first-class and salable condition, and that such goods were all of like kind and quality as certain boxes of new goods then in Minneapolis, and which were exhibited to him by plaintiffs. That fully relying on such representations and warranty, he was induced to enter into such deal. Then follow allegations of a breach of such representations and warranty and of plaintiffs' knowledge thereof and of resulting damages. These allegations were put in issue by a reply to such counterclaim.

Such were the issues submitted to the jury at the trial, and said jury returned a verdict in defendant's favor for the sum of \$1,000. The court's instructions to the jury are not before us and they are in no way challenged. The only assignments of error to be noticed are there-

fore those relating to certain rulings admitting and excluding testimony.

We will proceed now to a consideration of such of these assignments as are discussed in appellants' brief.

By the 8th assignment appellants complain of the ruling permitting defendant to testify to the effect that he told the plaintiff Heald, at the time the deal was made, that the chattel mortgage securing the note for \$1,422 was subject to the provisions of the rental contract between him and Christianson relative to a lien on Christianson's interest in the crops for advancements. At least two answers to such contention may be made. In the first place, the same matters embraced in the questions and answers objected to were, immediately prior to asking such questions, fully covered by defendant without objection. Hence, if error at all, such rulings were nonprejudicial. Second, we are clear that such rulings were proper, as such testimony did not in any way tend to vary the terms of a written contract as contended for by appellants. Counsel for appellants criticizes the holding of this court in *McFadden v. Thorpe Elevator Co.* 18 N. D. 93, 118 N. W. 242, and also attempts to differentiate the case at bar from that decision. We see no reason, however, to depart from the views there expressed, nor do we concur in the contention that the rule there adopted is not applicable here. Indeed, it would be strange if defendant could be precluded from showing the actual contract which these parties entered into, when concededly such contract rested in parol. If, as between the original parties to this mortgage, it was understood and agreed that it should be held subject to the security clause in the cropping contract covering advancements, certainly it was competent for defendant by express agreement with Heald, to assign the same on condition that he should hold it in exactly the same way, and such is the purport of the testimony complained of. We find no error in such ruling.

The remaining assignments which are in any manner discussed in the briefs all relate to rulings on the admission or exclusion of testimony introduced to establish defendant's counterclaim, such testimony all relating to the question of the damages sought to be recovered under such counterclaim. To some extent these assignments have a close relation to those involving the sufficiency of the evidence, and they are, as stated by counsel, treated in appellants' brief only in a general way.

In view of this, we feel justified in disposing of them in a like manner in this opinion. While the method pursued by defendant's counsel in proving such damages was perhaps not technically correct in every particular, we are satisfied that the testimony as a whole afforded a sufficient legal basis for the jury's assessment of damages, and that to the extent, if any, that such rulings constituted error, such error was nonprejudicial to the substantial rights of appellants, and we are convinced from the entire record that substantial justice was meted out to these parties in the district court. Entertaining these views it follows that the judgment must be, and accordingly it is, hereby affirmed.

BURKE, J., being disqualified, did not participate.

On Petition for Rehearing.

FISK, J. Counsel for appellants has filed a petition for a rehearing in the above cause. It presents nothing new, and it fails to convince us that our former views are incorrect. Ordinarily, under these circumstances, we deem it an unnecessary waste of time in disposing of like petitions, to add anything to the opinion as first announced. However, owing to certain statements in the petition, we deem a brief reply to the first two contentions advisable.

Counsel first challenges the correctness of the decision dismissing the appeal from the order denying his motion for a new trial. Among other things, he says: "There was no evidence in the record before this court that the order overruling plaintiff's motion for a new trial had been filed in the district court sixty days previous to the appeal, . . . and we rise to inquire how this court could conclude that the sixty days in which the right of an appeal from an order is granted had expired when the appeal was made in this case. The dismissal of the appeal from the order overruling the motion for a new trial was evidently inadvertently made, and it was not based upon any of the records in the case and was unwarranted." Such a bald statement cannot be permitted to go unchallenged in the light of the record before us. Counsel is entirely mistaken as to what the record discloses. The original order denying his motion is before us, and unmistakably shows that it was filed with the clerk of the district court on April 11th,

and the appeal not having been taken until June 15th, it was clearly too late.

Counsel's second contention in substance and effect is that, although the sufficiency of the evidence to support the judgment was in no manner challenged at the trial, that, nevertheless, on an appeal from the judgment, he may urge such insufficiency as an *error of law* occurring at the trial. An answer to such contention ought not to be necessary, as the practice is so firmly settled to the contrary. It is, of course, true, as held by this court in *Satterlee v. Modern Brotherhood*, 15 N. D. 92, 106 N. W. 561, that where the sufficiency of the evidence is challenged at the trial by a motion for a directed verdict, such ruling may be reviewed as an error of law in an appeal from the judgment. In that case both parties moved for a directed verdict at the close of the testimony, and prior to the entry of judgment a motion was made for judgment notwithstanding the verdict, and these rulings were very properly held reviewable on an appeal from the judgment, and that a motion for a new trial was not a condition precedent to the right to such review. A very different case is presented, however, in the case at bar. The sufficiency of the evidence was in no manner challenged at the trial. Counsel concedes in his petition that the decision of matters presented for the first time on a motion for a new trial made after judgment is final in the absence of an appeal from the order denying such motion. In other words, that, as to such matters, the order denying the new trial is *res judicata*. Yet this is all we held on such point in the foregoing opinion, and it is also the holding in the case of *Hedderick v. Hedderick*, 18 N. D. 488, 123 N. W. 276. Counsel seems to be laboring under the idea that because he has assigned, or attempted to assign, error predicated upon the alleged insufficiency of the evidence when the sufficiency was in no way challenged or ruled upon at the trial, there is a constitutional duty resting upon us to decide the question thus sought to be raised. It is, of course, entirely clear that such an alleged assignment is no assignment at all, for it in no manner challenges the correctness of any ruling in the court below. The question of the sufficiency of the evidence is therefore not before us on this appeal from the judgment, as manifestly such appeal does not bring before us the question of the correctness of an order denying a motion for a new trial made long after the entry of such judgment.

It is, of course, entirely different, as held in *Satterlee v. Modern Brotherhood*, supra, regarding rulings made at the trial and duly challenged. These are brought before us on an appeal from the judgment, although the same alleged errors were subsequently urged and passed upon as grounds for a new trial. This, we believe, fully answers counsel's contention, and we would stop here were it not for the persistent and unwarranted accusations of counsel that this court has violated or evaded § 101 of the Constitution by not passing upon the sufficiency of the evidence. Several pages of the petition are devoted to a discussion of this constitutional mandate, and to the duty of this court to observe it. All through such discussion counsel begs the question by assuming what, as we have seen, is not true, that the question of the sufficiency of the evidence fairly arises on the record. It is not an infrequent occurrence for other members of the bar to make like criticisms in their petitions for rehearings without the least justification therefor, clearly evincing a mistaken idea as to the proper and well-settled construction of this provision of our Constitution. In view of this, and for the information of such members of the bar, we embrace this occasion to express our understanding of said section. In order for a question to fairly arise on the record (in cases not triable *de novo*), it must, of course, not only in fact exist in the record, but it must be properly assigned as error. But this is not all, for it is not by any means true that every question thus assigned fairly arises on the record. If its decision is not *necessary* to a final and complete determination of the rights of the litigants, it cannot be properly said to fairly arise on the record, within the meaning of such constitutional mandate. It is absurd to impute to the framers of the Constitution an intent to require of the courts a decision of every point raised, regardless of whether a decision of other and controlling points in legal effect puts an end to the litigation. It would not only force upon the court needless labor, but it would be an unwise and dangerous practice, as it would inevitably result in laying down hastily prepared precedents on points naturally not as carefully considered as those which are necessarily controlling and decisive of the appeal. In view of this, it is well settled that, when necessary and controlling points are decided, the other questions cease to fairly arise on the record.

A like constitutional provision was construed many years ago by

the supreme court of Indiana, and such construction has been adhered to ever since. See *Willets v. Ridgway*, 9 Ind. 367. We quote therefrom as follows: "It is true that the Constitution, by an unwise provision, requires that this court shall give a written opinion upon every point arising in the record of every case,—a provision which, if literally followed, tends to fill our Reports with repetitions of decisions upon settled, as well as frivolous, points, and often to introduce into them, in the great press of business, premature, and not well considered opinions, upon points only slightly argued; yet it is a provision not to be disregarded, though merely directory, like that requiring the legislature to use good *English*. But though the provision is not to be disregarded, it is to be observed according to some construction, and should receive such a one as to obviate its inconvenience and objectionable character, as far as consistently can be done.

"It often happens that a point is raised involving an important principle, but of minor consequence in its bearing upon the particular case, while it presents the material question in some other pending cause. Now, to decide it in the case where, from its subordinate position, it is but carelessly argued, by one side or the other, if at all, and hence, perhaps, but hastily considered by the court, is unjust to counsel whose subsequently pending cause is thus prejudged, without their being heard, and upon an argument, on which they would be unwilling to rest it. It is this class of decisions which forms the bane of judicial reports.

"These, and other considerations, have led the court to inquire, When does a question, in the sense of the Constitution, arise in the record?

"We do not think it does so merely because it is raised by counsel, nor because it is presented in the assignment of errors. Nor, necessarily, because it is raised in a bill of exceptions. It must be a question, the decision of which is necessary to the final determination of the cause; and which the record presents with a fullness and distinctness rendering it possible for the court to comprehend it in all its bearings.

"Hence, it has been the frequent practice of the court in cases where a single point would put an end to a case, to decide that point, and no other.

"So, where a cause was necessarily reversed for one or more errors,

and remanded for a new trial, which might be upon new issues formed by amended pleadings, and with more or less evidence, points which were made upon the first trial, but might not arise upon the record, or were not so distinctly and satisfactorily presented by the record as they might be after another trial, have been considered as not necessarily and properly arising in the record, and have been passed. See *Ferguson v. Harrison*, 7 Ind. 610; *Newell v. Gatling*, 7 Ind. 147; *Rogers v. Stevens*, 8 Ind. 464; *Clark v. Trovinger*, 8 Ind. 335; *Postlethwaite v. Payne*, 8 Ind. 104; *Mason v. Smith*, 8 Ind. 73; *Maxwell v. Collins*, 8 Ind. 40; *Henry v. State Bank*, 3 Ind. 221."

For later Indiana authorities on this point, see *Trayser v. Indiana Asbury University*, 39 Ind. 556, and *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.* 116 Ind. 578, 19 N. E. 440. From p. 590 of the latter opinion we quote the following: "The gravity and importance of the question is such that we have concluded that it should only be decided in a case where it is indispensably necessary to a proper and adequate judgment. We do not, as we have indicated, believe this is such a case, for we think that our decision upon a point which precedes the one mentioned fully and properly disposes of this appeal. We believe our duty is done when we fully meet and decide a question which leads to a reversal without investigating and deciding questions which lie beyond. Where a material question first in point of priority is decided, all the questions that the record legitimately brings to us are disposed of within the meaning of § 5 of article 7 of our Constitution. That provision cannot mean that in cases of reversal every point must be decided, even though some one of them completely disposes of the case; nor does it mean that the court must write upon all questions, but that it must write on such only as are decided. This court has uniformly acted upon the rule that where there is a judgment of reversal, it will not consider all of the questions urged or presented, except in cases where it is clear that they will arise on a new trial, and even then the questions are not decided because it is the duty of the court to decide them, but because it is best to do so as a matter of expediency. We doubt whether a single volume of our Reports can be found, from the time our Constitution went into effect until the present, which does not contain cases in which this rule was acted upon by the court. Questions which come after a pivotal one that controls

the case, and the decision of which completely disposes of the appeal, cannot, as a general rule, be accurately said to be presented by the record in cases of reversal, although there may be, and perhaps are, exceptional cases. If it were otherwise, the court might often and often be required to go far beyond the decision of a question which disposes, adequately and properly, of a pending appeal, and we think it evident that only such questions as must be decided, in order to justly and completely dispose of the case before the court, can be said to be 'questions arising in the record,' and questions upon which the court must write. If, to sum up in a short way, the court decides all the questions essential to a full and effectual disposition of the case at its bar, and writes on those questions, it has done its full duty under the Constitution." See also 15 Enc. Pl. & Pr. pages 306 and 307 and cases cited.

Ever since this court was organized it has recognized and adhered to a construction of § 101 in accordance with the above holdings.

The petition for a rehearing is denied.

ROBERTSON LUMBER COMPANY v. CLARKE.

(138 N. W. 984.)

Mechanics' lien — to what property attaches.

1. Sections 6237 and 6238, Rev. Codes 1905, authorizing the filing of a mechanics' lien for labor and materials furnished "for the construction or repair of any work of internal improvement, or for the erecting, alteration, or repair of any buildings or other structures upon land," etc., construed and held to authorize the filing of such lien against two or more buildings and the land upon which they stand, where such labor or material is fur-

Note.—On the right to file a single mechanics' lien against several buildings, see notes in 17 L.R.A. 314 and 65 Am. St. Rep. 165. And as to the extent of land to which mechanics' liens will attach, see note in 26 L.R.A.(N.S.) 831. And the authorities upon the right to a mechanics' lien where building covers adjoining lots held in severalty are reviewed in a note in 30 L.R.A.(N.S.) 1219.

For a discussion of the authorities on the priority of statutory preference of claim for labor over pre-existing mortgage, see notes in 2 L.R.A.(N.S.) 615 and 25 L. ed. U. S. 1057, and earlier note in 14 L.R.A. 306.

nished under an entire contract. Chapter 158, Laws of 1909, which amends § 6237, Rev. Codes 1905, does not change the former law in this respect.

Mechanics' lien — finding as to entirety of contract.

2. The finding of the trial court that the material for the two dwellings was furnished by plaintiff under an entire contract is sustained.

Mechanics' lien — to what property attaches — entirety of contract.

3. Appellant's contention to the effect that under the statute a mechanics' lien statement can be filed only against the building and the particular lot upon which the same is situated, is held without merit. The two dwellings having been constructed from material furnished under a single contract, it was permissible to file a lien statement against both buildings and the four contiguous lots, upon which they are situated.

Mechanics' lien — itemized statement of materials.

4. Chapter 158, Laws 1909, requiring a separate itemized account to be kept of materials furnished, should be given a reasonable interpretation, and where a separate itemized account is, in good faith, kept, but through an unintentional mistake or clerical error an item of minor importance is included therein which belongs to another account, such fact will not operate to deprive the materialman of the right to a lien.

Mechanics' lien — affidavit of verification.

5. Where the lien statement is duly signed by the materialman, but he omits to sign the affidavit of verification, such omission is not fatal to the lien where it appears that he, in fact, made oath to the truth of the facts stated in such affidavit. In other words, it is not a necessary essential to the validity of such an affidavit that the affiant should subscribe his name thereto, although this is the usual and better practice.

Mechanics' lien — statement.

6. To entitle a materialman to a lien, he must comply with § 6240, Rev. Codes 1905, which requires him to file with the clerk of the district court "a just and true account of the demand due him after allowing all credits," etc. Appellant's contention that this statutory requirement was not complied with by plaintiff is held without merit. Except as to the item of \$10.83, which was included in the account through a clerical error, such account is held to correctly state the various items of debits and credits, and the fact that, in striking a balance by subtracting the total credits from the total debits, a mistake of \$100 was made, does not operate to defeat the lien.

Mechanics' lien — priority as to mortgage.

7. Appellant's contention that the mortgages held by him represented the purchase price of the lots, and that they are therefore entitled to priority over plaintiff's mechanics' lien, is held untenable, there being no proof in support of such contention.

Deposition — opportunity to cross-examine witness.

8. Appellant moved in the court below to suppress the deposition of a witness for plaintiff upon the ground that sufficient time was not afforded him in which to appear and cross-examine such witness. The taking of the deposition was noticed for October 14, 1911, at Pontiac, Michigan, and service of the notice was made at Grand Forks on October 10th. No claim is made that appellant was, in fact, prevented from appearing or being represented at the taking of the deposition, and, furthermore, we think sufficient time for this purpose was afforded him, and the ruling of the trial court in refusing to suppress the deposition is therefore sustained.

Appeal — trial de novo — affirmance.

9. Upon a trial *de novo* of the entire case, we reach the conclusion that the decision of the court trial was, in all things, correct, and its judgment is accordingly affirmed.

Opinion filed December 10, 1912.

Appeal by defendant, Sidney Clarke, from a judgment of the District Court for Grand Forks County, *Charles F. Templeton, J.*, in plaintiff's favor foreclosing a mechanics' lien.

Affirmed.

H. A. Bronson, for appellant.

Scott Rex, for respondent.

FISK, J. This action originated in the district court of Grand Forks county, and was brought for the purpose of foreclosing a mechanics' lien on lots 5, 6, 7, and 8 of block 18, Budge and Eshelman's 3d addition to the city of Grand Forks. The material, for the purchase price of which the lien is claimed, was sold and delivered by plaintiff to the defendant Niles Swenson, for the construction of two dwellings on said lots, one on lots 5 and 6, and the other on lots 7 and 8. Several other parties, including the appellant, Clarke, were joined with Swenson as defendants, but the appellant, Clarke, is the only defendant who made any appearance in the action. He is the assignee of two certain mortgages of \$200 each, covering the property in question, executed and delivered by Swenson, and he asserts the superiority of the liens thus held by him over plaintiff's mechanics' lien. He also attacks the validity of plaintiff's alleged lien on several grounds which will be hereafter noticed, and also contends that certain payments have

been made on the plaintiff's claim which have not been credited. These, in brief, are the issues involved. Plaintiff had judgment in the court below from which this appeal is prosecuted, and the appellant has specified that he desires a review of the entire case in this court.

In his printed brief and argument appellant's counsel argues his various contentions under ten separate points, and we will consider and decide such points in the order presented.

Under point 1 appellant contends that, even conceding that the sale by plaintiff to Swenson of the material for the two dwellings was made under an entire contract, still under our mechanics' lien statute plaintiff was not authorized to file a joint lien statement against both buildings and the several lots described. This contention is based on the phraseology of chapter 158, Laws of 1909, which amended § 6237, Rev. Codes 1905. As thus amended, this section gives a lien to each person who shall perform labor or furnish materials for the erection, alteration, or repair of "any building or other structure." Prior to such amendment the words corresponding to those quoted were "any buildings or other structures." By such amendment the following provision was also added: "Provided, no person furnishing material . . . for any of the purposes aforesaid shall be entitled to a lien . . . unless he shall keep an itemized account thereof, separate and apart from all other items of account against the purchaser." Said statute was also amended in other particulars not material to this controversy. It is argued that, because the singular number is substituted for the plural form in referring to the edifice to be built, when taken in connection with the requirement that the materialman must keep an itemized account thereof, separate and apart from all other items of account against the purchaser, a legislative intent is manifested of limiting a mechanics' lien to one dwelling or structure only. We are unable to view the matter in this light, and we think it clear that there was no legislative purpose to effect any change in the former statute in this respect; for, if so, the legislature would most certainly have also changed § 6238 from the plural to the singular number in referring to the edifices or structures upon which liens might be claimed. The plural form is still retained in the latter section. It is manifest that the only change contemplated by such amendment was to impose on lien claimants the necessity of keeping a separate itemized account of

materials furnished from all other accounts against the purchaser and against the contractor or subcontractor, and also amending the statute with reference to the notice to be given the owner where material has been furnished to a contractor or subcontractor. Appellant's counsel recognizes the fact that there is lack of harmony between § 6237 as amended, and § 6238; but, as we understand him, he contends for a construction of the latter section which will make it harmonize with the other, and to this end he urges that § 6238 should be construed as giving the materialman a lien on each separate dwelling or structure, although the material was sold under an entire contract, provided a separate itemized account is kept of the material sold for each building. The insuperable obstacle in the way of such a construction is the plain wording of the statute to the contrary, for the language clearly confers the right to file a single lien upon all the buildings, erections, or improvements where the labor is done or material furnished therefor under a single contract; and it provides that upon the foreclosure of such a lien the court may, where such buildings, erections, or improvements are upon separate farms, tracts, or lots, apportion the amount of the claim among the several farms, tracts, or lots in proportion to the enhanced value of the same, caused by means of such labor or materials, where such apportionment is necessary to protect the rights of third persons. That plaintiff was authorized to file one lien statement covering both buildings is settled in this jurisdiction. *Stoltze v. Hurd*, 20 N. D. 412, 30 L.R.A.(N.S.) 1219, 128 N. W. 115, Ann. Cas. 1912 C, 871; *Meyer Lumber Co. v. Trygstad*, 22 N. D. 558, 134 N. W. 714. See also *Johnson v. Salter*, 70 Minn. 146, 68 Am. St. Rep. 516, 72 N. W. 974, and cases cited. We are forced to conclude, therefore, that appellant's contention under point 1 is without merit.

Under point 2 appellant's counsel asserts as a legal proposition that "where there is a divisible contract, or two contracts for the furnishing of materials in the erection of two dwellings upon two different lots, even though owned by the same party and constructed about the same time, a single or joint lien cannot be filed therefor upon both buildings and lots." We find it unnecessary, however, to consider this question, for we agree with the trial court that the material was furnished by plaintiff under but one contract. The finding to such effect by the trial

court is, we think, in accordance with the weight of the testimony. The record discloses that the building material in question was used in the construction of two dwelling houses upon a single tract of land having a frontage of 100 feet on Budge avenue, and consisting of four contiguous lots, the dimensions of each being 25x140 feet. These dwellings were constructed between April 25th and July 14, 1910.

The witness Crawford, who was in plaintiff's employ and had charge of the sale and delivery of stock from its yards at the time in question, testified as follows:

Q. At the time Mr. Swenson agreed to accept your figures of \$331, what is the fact as to whether he ordered the material for the second house at the same price?

A. He said he would buy the two houses, provided I would add 600 feet of casing and 8 rolls of string felt *and we closed the deal on that basis.*

Swenson does not directly contradict Crawford on this point, and we think the trial court was amply justified in accepting such testimony as controlling. It is true that there is considerable testimony in the record tending directly, as well as indirectly, to show the existence of two contracts; but when the entire testimony is weighed and considered together, much of the testimony which appears to be inconsistent with Crawford's testimony above quoted is susceptible of explanation, and is explained so as to harmonize therewith. It would serve no useful purpose to review such testimony at length in this opinion. Suffice it to say, as above stated, that we are satisfied with the correctness of the trial court's findings on this issue, and appellant's second point need not be further considered.

Under point 3 it is contended that under the statute a mechanics' lien can only be filed against the building and the particular lot upon which the same is situated, and that, because one of these buildings was erected on lot 5 and the other on lot 7, that a lien filed on the entire property was and is a nullity. We do not think there is any merit to such contention. These four contiguous lots should be treated as a single tract 100x140 feet in size; but in any event, under the provisions of § 6238, Rev. Codes, it was proper, in view of the fact that

these dwellings were constructed under a single contract, for plaintiff to file a single lien upon both buildings and the lots upon which they stand; and we think lots 6 and 8 surely must be deemed appurtenant to lots 5 and 7 respectively, within the meaning of the mechanics' lien statute. See 20 Am. & Eng. Enc. Law, 2d ed. 286, and cases cited.

Under point 4, appellant contends that, even though it be conceded that the contract herein is single and entire; and, further, that a lien for a single contract can be spread upon buildings situated upon different lots,—that the alleged lien is a nullity because plaintiff did not comply with chapter 158, Laws of 1909, by keeping a separate itemized account of the materials furnished for such buildings. It is true the statute is explicit on this point, and any material departure therefrom will deprive a person of the right to file a lien. The record discloses, however, that a separate itemized account was kept by plaintiff in accordance with the statute, with the exception of one item amounting to \$10.83 for materials furnished to Swenson to be used elsewhere, which found its way in this account purely through a clerical error; and we do not think a fair construction of the statute requires us to hold such unintentional mistake or clerical error by plaintiff's clerk or employee, fatal to plaintiff's right to file a lien. The construction contended for, as applied to the facts in this case, would be grossly unjust and unreasonable. We cannot believe that it was the legislative intent to deprive a person of a lien who, in good faith, has attempted to comply with the statute, but, through an unintentional mistake or clerical error as to an item of minor importance, has failed to literally comply therewith. A liberal rule for the construction of mechanics' lien statutes has been adopted by this court. *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340; *Salzer Lumber Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036. Our views, as above expressed, find support in the following authorities: *Turner v. St. John*, *supra*; *Griff v. Clark*, 155 Mich. 611, 130 Am. St. Rep. 582, 119 N. W. 1076, 29 L.R.A.(N.S.) 305, and case note; *Coughlan v. Longini*, 77 Minn. 514, 80 N. W. 695; 27 Cyc. 200; 20 Am. & Eng. Enc. Law, 408.

Under his point 5, appellant asserts that the alleged lien is a nullity because the lien statement contains no proper verification; it appearing that Crawford, who made the same, omitted to sign it. Our attention is called to the fact that the only evidence upon the question

as to whether Crawford subscribed and swore to the affidavit is that of the witness Haggerty, the notary, who testified that the same was signed and sworn to by Crawford before him, as a notary public, on the date which it bears. The original statement for lien is before us, and it appears therefrom that Crawford signed the same as agent for plaintiff, but he did not sign the affidavit of verification which is on the same sheet immediately following such statement, nor do we think it was necessary that he should do so. Section 7266, Rev. Codes 1905, defines an affidavit as a written declaration under oath. It seems to be well settled that, in the absence of a statute or rule of court requiring the affiant to subscribe his name to the affidavit, it is not necessary for him to do so. *Bates v. Robinson*, 8 Iowa, 318; *Norton v. Hauge*, 47 Minn. 405, 50 N. W. 368; *Petaluma v. White*, 152 Cal. 190, 92 Pac. 177; *A. P. Hotaling & Co. v. Brogan*, 12 Cal. App. 500, 107 Pac. 711; 2 Cyc. 26, and numerous cases cited. It is true the rule as announced by a few courts is to the contrary; but the great weight of authority holds, and we think the better rule is, as we have stated. There is nothing in the opinion in *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340, which conflicts with our holding as above announced.

Under point 6, appellant contends that the plaintiff did not comply with § 6240, Rev. Codes, which requires the lien claimant to file with the clerk of the district court "a just and true account of the demand due him after allowing all credits," etc. In support of such contention, our attention is called to the fact that in the lien statement, as well as in the itemized account attached thereto, a claim is made for \$100 more than the amount due. Appellant's contention is without merit. The itemized account shows the total debits to be \$940.22 and the total credits \$101.70, and, in striking a balance, an error of \$100 was made in subtracting the credits from the debits. It is apparent on the face of the exhibit that this was a mere mistake, and such error in the balance naturally found its way into the lien statement. Under the authorities heretofore cited, it is clear that such an error will not nullify the lien. For the same reason the item of \$10.83, heretofore mentioned and which was through error included in the account and lien statement, does not affect the validity of plaintiff's lien. The trial court properly deducted these two items from the amount of plaintiff's recovery. Appellant also asserts that the itemized account is

not just and true, for the reason that it omits two credits which he claims should be made, one for \$150 and the other for \$400, and this necessitates an inquiry as to the correctness of such contention. The trial court found in plaintiff's favor on this issue, holding that the only credits to which Swenson was entitled are the amounts credited in the account, aggregating \$101.70. We are satisfied with the correctness of the trial court's finding. The item of \$150 consisted of a check delivered by one Hatcher to Swenson, but made payable to the Robertson Lumber Company, and represented the proceeds of certain loans negotiated by Swenson through Hatcher. So far as the evidence discloses, Swenson had the right to direct the application of such payment wherever he pleased. The check represented money belonging to him. But whether, as between himself and Hatcher, this is true or not, plaintiff had no notice which would interfere with its right, as well as its duty, to make such application as Swenson directed. The notation "Budge ave. cottages," in the lower left-hand corner of the check, was of no significance so far as plaintiff was concerned; and it did not operate to impute to plaintiff any notice, even of Hatcher's desire, that the check should be applied on any particular indebtedness owing by Swenson to plaintiff. That Swenson directed the application thereof on indebtedness other than the account in question is, we think, very clearly established by the weight of the evidence. Most of it was applied in payment of a note held by plaintiff against Swenson, which note was at the time canceled and delivered to him, and the balance on another account.

Much of what we have said of the alleged payment of \$150 is applicable to the alleged payment of the \$400 item. Except as to the latter the check was drawn by Hatcher and made payable directly to Swenson, who indorsed the same to plaintiff. The money represented by such check belonged to Swenson, and so far as plaintiff is concerned Swenson had the right to direct its application; and we think it reasonably clear from the testimony that he directed it to be applied not on the account in question, but on another and older account owing by him to the plaintiff; and we are convinced from the record that the findings of the trial court on this issue are correct. Under the facts there is no room for applying the equitable doctrine governing applications of payments invoked by appellant's counsel.

It is next asserted by appellant that the lower court erred in holding the lien of appellant's mortgages inferior to plaintiff's lien, it being asserted by appellant that such mortgages were given to secure the purchase price of the lots. Such contention must likewise be overruled for the obvious reason that there is no evidence from which it can be determined that the mortgages were given for such purpose. It is true Hatcher testified that these lots were sold to Swenson on contract in January, 1910, and that a deed was given to him in June of that year, and that Hatcher Brothers made four loans secured by mortgages on these lots "to assist in the payment of labor and material entering into the construction of the houses, and partly to cover the balance due on the purchase price of the lots." But such loans were not closed until after these dwellings were constructed or were in course of construction, and he admits knowledge of the fact that such houses were being constructed on the property and that plaintiff was furnishing the material therefor. There is no proof of what the purchase price was, nor as to what part, if any, of such purchase price was included in the notes secured by the two mortgages now held by appellant, and manifestly there was no foundation in the evidence for a finding that any part of such notes represent such purchase price.

Next, it is appellant's contention that the trial court erred in not suppressing the deposition of the witness Crawford, which was taken at Pontiac, Michigan, on October 14, 1911, the notice to take such deposition having been served on appellant's counsel on October 10, 1911. We do not think there is any merit in this point. No claim is made that, owing to the brief time allowed, appellant was, in fact, prevented from appearing; and, furthermore, we think there was, in fact, sufficient time allowed in which an appearance might have been made by the use of due diligence.

We have considered the other questions raised by appellant's counsel and find no merit therein; and we are convinced, from the entire record, that the decision of the trial court was in all things correct, and the same is accordingly affirmed.

FLEMING v. SHERWOOD.

(43 L.R.A.(N.S.) 945, 139 N. W. 101.)

Bills and notes — negotiability.

1. Under § 6303 of the Code of 1905, a note is not negotiable which contains the following provision: "Payee's ownership of the goods account of which this note is given, the account thereof, and the contract conditions of original sale, are not affected by accepting this note until receipt of full amount due thereon." Such note does not "contain an unconditional promise or order to pay a sum certain in money," but bears upon its face the suggestion of a conditional sale.

Ratification of agent's act — effect.

2. One who ratifies the unauthorized act of an agent by accepting the benefits of the transaction will be held to incur the obligations as well as the benefits of the transaction.

Opinion filed December 11, 1912.

Appeal by plaintiff from a judgment of the District Court for Cass County, *Pollock, J.*, in defendant's favor in an action on a promissory note.

Affirmed.

Statement by BRUCE, J. Early in May, 1908, one H. Q. Turner, a collecting agent for Fetzner & Company, telephoned from Fargo to defendant, a farmer at Verona, that in settling up the Fetzner & Company business in North Dakota he had two drills which he proposed to sell the defendant for \$50. It was agreed that the drills should be delivered to the defendant at Verona, North Dakota, in the June, following. A note dated May 12, 1908, was sent by Turner to the defendant, and was signed by the defendant and returned by mail.

Note.—The authorities on the question of the reservation of title of property as affecting negotiability of note for purchase price are gathered in a note in 43 L.R.A. 277, and in a supplemental note appended to the report of the above case in 43 L.R.A.(N.S.) 945, where it is shown that, as appears in the earlier note, the negotiability of a note is not destroyed merely because, in addition to the promise to pay, it contains a statement that the title to the property for which the note is given is not to pass until the note is paid.

The note was as follows: "October 1st after date I promise to pay to Fetzter & Company, or order, fifty and no/100 dollars with interest at 7 per cent per annum from maturity until paid, with all attorneys' fees for collection of this note unless not collectable by law. Value received, waiving all right of valuation or appraisement law, home-stead or other exemption; as to this debt. Payee's ownership of goods of which this note is given, the account thereof, and contract condition of original sale, are not affected by accepting this note until receipt of full amount due thereon." This note was on June 9th, 1908, sold to the plaintiff, who testifies that at such time he had no knowledge of any defenses thereto, and this fact is not disputed, although there is some somewhat inconclusive evidence which might tend to show that at the maturity of the note Fetzter & Company made a demand for its payment. The evidence showed that Fetzter & Company did not ship the drills to defendant at any time, nor did the defendant ever receive such property. It does not show, however, that he ever made any demand for such drills until asked to pay the note. At the close of the evidence the plaintiff moved for a directed verdict, which motion was denied. The jury thereupon rendered a verdict in favor of the defendant, and plaintiff moved for judgment notwithstanding the verdict, and in the alternative for a new trial. This motion was also denied, and on the 14th day of June, 1911, judgment was rendered in favor of the defendant, and against the plaintiff. Plaintiff appeals from the order denying his motion and from the judgment.

A. C. Lacy, for appellant.

A clause retaining title in the vendor does not destroy negotiability, *First Nat. Bank v. Slaughter*, 98 Ala. 602, 39 Am. St. Rep. 88, 14 So. 545; *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811; *W. W. Kimball v. Mellon*, 80 Wis. 133, 48 N. W. 1100; *Chicago R. Equipment Co. v. Merchant's Nat. Bank*, 25 Fed. 809; *Burnley v. Tufts*, 66 Miss. 48, 14 Am. St. Rep. 540, 5 So. 627; *Bank of Carroll v. Taylor*, 67 Iowa, 572, 25 N. W. 810; *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999; *Mott v. Havana Nat. Bank*, 22 Hun, 354; *Third Nat. Bank v. Bowman-Spring*, 50 App. Div. 66, 63 N. Y. Supp. 410; *Arnold*

24 N. D.—10.

v. Rock River Valley Union R. Co. 5 Duer, 207; Hodges v. Schuler, 22 N. Y. 114; Frank v. Wessels, 64 N. Y. 155.

Turner & Murphy, for respondent.

A contract for the payment of a sum certain on a day certain, which has coupled with such promise a stipulation reserving the title of property in the payee, not a contract which can become a negotiable instrument. *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558; *Pfeiffer v. Norman*, 22 N. D. 168, 38 L.R.A.(N.S.) 891, 133 N. W. 99; *Sloan v. McCarty*, 134 Mass. 245; *Killam v. Schoeps*, 26 Kan. 310, 40 Am. Rep. 313; *Wright v. Traver*, 73 Mich. 493. 3 L.R.A. 50, 41 N. W. 517; *First Nat. Bank v. Alton*, 60 Conn. 402, 22 Atl. 1010; *South Bend Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. 574; *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350; *Post v. Kinzua Hemlock R. Co.* 171 Pa. 615, 33 Atl. 362; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; 7 Cyc. 581.

BRUCE, J. (after stating the facts as above). Many errors are assigned by the plaintiff and appellant. The principal error, however, is that alleged to have been committed by the trial court in holding that the note in controversy was not negotiable. If this question is determined adversely to the plaintiff and appellant, it practically disposes of the remainder of the assignments, and the judgment of the lower court should be sustained.

We are of the opinion that the note was not negotiable. The question before us is an exceedingly difficult one to determine, as are usually all questions which involve a construction of the statutes. In considering the same we must bear in mind that we are construing the provisions of the so-called uniform negotiable instruments act, and not of the former statutes of this state, nor of the law merchant. We must, however, consider, to a greater or less degree, these former statutes and the law merchant, as their provisions and interpretation are all that we have to go by in construing many of the doubtful provisions of the codified, uniform law. We, in fact, have been able to find no cases since the adoption of the uniform act in this state which have directly passed upon the question before us. Counsel for the respondent, it is true, cites the case of *Gazlay v. Riegel*, 16 Pa. Super. Ct. 501, but that case, though handed down after the adoption of the uni-

form act in Pennsylvania, considered and construed a note which was executed prior to the passage of the statute.

The specific question which we are called upon to decide is whether the special clause in the instrument before us, to the effect that "payee's ownership of goods account of which this note is given, the account thereof, and contract condition of original sale, are not affected by accepting this note until the receipt of the full amount due thereon," has the effect of neutralizing the otherwise positive agreement to pay, and of destroying the negotiability of the instrument. The uniform negotiable instruments act (Rev. Codes 1905, §§ 6303 et seq.) provides, among other things, that "an instrument, to be negotiable, . . . (2) must contain an unconditional promise or order to pay a certain sum in money;" and "(3) must be payable on demand or at a fixed or determinable future time." This former provision, however, is qualified by § 6305, which provides, among other things, that "an unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with . . . a statement of the transaction which gives rise to the instrument." The question, then, before us, resolves itself into the question whether the promise to pay is unconditional.

There is a conflict in the authorities under the law merchant and under the statutes which were based upon it, as to the effect of a reservation of title in the vendor of goods which is noted on the face of the instrument. Some of the cases make the distinction turn upon the fact of possession. Some hold that where the right of possession is in the vendee, and the seller has merely a naked title subject to the interest of the buyer, while the buyer has the right of possession and the contingent right to a title which would vest absolutely on the payment of the agreed price without further act on the part of the seller, the transaction is a security transaction, and not a conditional sale, and that the note is none the less negotiable. They hold, however, that where the possession is retained by the seller until the full payment of the purchase price, as well as the title, the note is not negotiable, since the agreement to pay is conditioned upon the fact of delivery, which is within the control of the vendor, and who, on the failure to pay at maturity, might cancel the agreement and retain the property. They in short hold that in such cases there is no positive agreement to pay,

but rather that the transfer of title and possession and payment shall be simultaneous acts. Some reach this conclusion even where the possession is in the vendee, holding that the transfer of title is contingent upon the payment, and the promise to pay is therefore conditional. Others hold that the reservation of title in an instrument incorporates into the same a dual contract, and for this reason renders it non-negotiable. Others still hold that the reservation of title, even though coupled with possession, or the right to retake possession even after delivery if the vendor feels himself insecure, and this whether before or after the time when the payment has become due, does not have the effect of rendering the instrument non-negotiable, provided that the promise to pay is in itself unconditional. There can be no doubt, however, that the weight of authority under the law merchant and the former statutes is against the negotiability of a note which upon its face retains title in the vendor, and this whether the possession is retained by the vendor or not. 7 Cyc. 581; Sloan v. McCarty, 134 Mass. 245; First Nat. Bank v. Alton, 60 Conn. 402, 1010; South Bend Iron Works v. Paddock, 37 Kan. 510, 15 Pac. 574; Killam v. Schoeps, 26 Kan. 310, 40 Am. Rep. 313; Wright v. Traver, 73 Mich. 493, 3 L.R.A. 50, 41 N. W. 517; Bannister v. Rouse, 44 Mich. 428, 6 N. W. 870; Edwards v. Ramsey, 30 Minn. 91, 14 N. W. 272; Deering v. Thom, 29 Minn. 120, 12 N. W. 350; Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Third Nat. Bank v. Spring, 28 Misc. 9, 59 N. Y. Supp. 794; W. W. Kimball & Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100; Post v. Kinzua Hemlock R. Co. 171 Pa. 615, 33 Atl. 362. And in our research we have only been able to find one case, that of Siegel, C. & Co. v. Chicago Trust & Sav. Bank, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417, in which a note was held negotiable where the temporary possession, at any rate, was not in the vendee. Such at any rate is true of the following cases: First Nat. Bank v. Slaughter, 98 Ala. 602, 39 Am. St. Rep. 88, 14 So. 545; Howard v. Simpkins, 69 Ga. 773, and same case in 70 Ga. 322; Burnley v. Tufts, 66 Miss. 48, 14 Am. St. Rep. 540, 5 So. 627; Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811; Third Nat. Bank v. Bowman-Springs, 50 App. Div. 66, 63 N. Y. Supp. 410; Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed.

349, 10 Sup. Ct. Rep. 999, affirming 25 Fed. 809; Choate v. Stevens, 116 Mich. 28, 43 L.R.A. 277, 74 N. W. 289.

"The contract declared on," says Mr. Justice Field in the case of Sloan v. McCarty, 134 Mass. 245, "contains a promise to pay to the plaintiff or order a certain sum of money in one month from date for a horse received of the plaintiff. If this were all, it would be a promissory note, as the recital of the consideration does not affect the character of the contract; but the contract also contains an agreement that the horse should remain the property of the plaintiff until paid for in full by the defendant. This is not an agreement relating to the manner in which the promise to pay money may be enforced, but is a substantive agreement. The whole contract describes a conditional sale of a horse. If the money were not paid by the defendant at the time specified, the plaintiff could, if he chose, rescind the conditional sale, and the defendant then would have no right to the horse and would be no longer liable to pay the note. If the plaintiff should insist upon the performance of his promise by the defendant, the obligation of the defendant to pay the money is in legal effect conditional upon the title to the horse vesting in him when the money is paid in full, and this condition appears on the face of the contract. The contract contemplates that the payment of the money by the defendant, and the transfer of the title to the horse from the plaintiff, should be simultaneous acts, and if the horse should die, for example, within a month, without fault on the part of the defendant, the plaintiff would be disabled from transferring the title, and could not maintain an action on the contract. . . . The contract is something more than a promise to pay money, and the promise to pay money is not a promise to pay it absolutely and at all events, and therefore the contract is not a promissory note within the meaning of the General Statutes." This was a case in which the title alone was reserved by the vendor.

A much stronger case, of course, for non-negotiability, is presented where both the title and the right of possession are reserved in the vendor, and this seems to be the case with the note before us. It is to be noted that the reservation in the instrument is a reservation to the vendor of the *ownership* of the goods, and not merely the title. Section 4702, Rev. Codes 1905, in defining the term, provides that "*the ownership of a thing is the right of one or more persons to possess and use*

it to the exclusion of others. In this Code the thing of which there may be ownership is called property." We thus find a note before us which reserves in the vendor the right to use and possess. The term, in fact, is broader than either the term *title* or *possession*, and includes both. "The owner of property is said to be one 'who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and to do with as he pleases, either to spoil or destroy it as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.'" *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202, 28 N. W. 455. "Ownership is the right by which a thing belongs to an individual to the exclusion of all other persons. *Converse v. Kellogg*, 7 Barb. 590. The term *title*, indeed, has been defined to be "that which constitutes a just cause of exclusive possession, or which is the foundation of ownership of property." Webster's Dict.; *Houston v. Farris*, 71 Ala. 570, 571; *Pratt v. Fountain*, 73 Ga. 261, 262. We thus have in the case at bar a promissory note which reserves to the vendor the right to the possession of the goods, as well as the title, and which also is open to the charge of uncertainty in that it refers to the terms and conditions of a contract, the exact nature of which is undisclosed. Even under the most liberal rule, such a contract or note does not evidence an unconditional promise to pay, and though the evidence discloses that there was a parol agreement that delivery of the goods should be made, the written note negatives this agreement, and the facts disclose that no such delivery was ever made.

We realize that § 6305 of the negotiable instruments act provides that an unqualified order or promise to pay is unconditional within the meaning of the chapter though coupled with "a statement of the transaction which gives rise to the instrument." We have in this case, however, something more than the statement of the transaction. In fact there is no statement of the transaction at all. We have a *reference* to a transaction and to a contract which may be entirely inconsistent with an unconditional promise to pay, and an express agreement of reservation of ownership, which in itself makes the agreement to pay conditional. The contract disclosed is that of a conditional sale, and not of a security transaction. Whether even a security transaction was intended to be permitted by the statute is a matter which is of no little doubt. Those interested in the preparation of the original uni-

form act certainly were in doubt on the question. See Brannon, Neg. Inst. Law, p. 6. We may certainly rest assured that a reservation of ownership was never intended by the legislature. Not only are we led to this conclusion from an examination of the authorities, but from a perusal of the act itself. If such reservation was intended to be permitted, why did the act (§ 6307) specially provide that an authorized sale of *collaterals* should not affect the negotiability of the instrument, and say nothing of the reservation of title or ownership, or the right of possession of the principal article sold. Those who adopted the instrument could not have been blind to the state of the law upon the question,—to the fact that even upon the question of the reservation of title there was a conflict in the authorities, and that there were no authorities in favor of the assumption of negotiability where both the title and the entire right of possession were reserved. A few words might have settled the controversy in favor of the negotiability, but they were not spoken. Numerous other mooted questions were settled by the act, among them the effect of a provision for payment out of a specified fund, the authorization of a confession of judgment, etc., all of which were mooted under the law merchant and the former statutes. The silence of the legislature on the question involved in this case is to us almost, if not entirely, conclusive.

The other assignments of error are equally without merit. Objection is made to the allowance in evidence of a telephone message alleged to have been received from H. Q. Turner without proof of his agency, and without laying the foundation as to knowledge of his voice, etc. Also to a statement of the said Turner that he was an agent of Fetzer & Company. There would be some merit in these objections were it not for the fact that the defendant mailed the note to Turner in response to such telephone message; that the note was made payable to Fetzer & Company, and that Fetzer & Company afterwards sold the same to the plaintiff. There was, in fact, a complete ratification of the acts of Turner by Fetzer & Company, and there was no need of proving agency at all. One cannot accept the benefits of a transaction and repudiate its obligations, and though it is true a ratification may be avoided by showing that it was made without knowledge of the material facts, the burden of showing such knowledge or lack of knowledge

was upon Fetzner & Company, or its indorsee, and not upon the defendant.

The judgment of the District Court is affirmed.

CYSEWSKI v. FRIED.

(139 N. W. 104.)

Appeal — abstracts — rule as to.

1. Attention is called to rules 7 and 12 of this court and the necessity of compliance therewith by counsel in the preparation of abstracts on appeal.

Auctions — warranty.

2. While at common law an auctioneer cannot, in the absence of authority so to do, warrant property sold, his power in this state is fixed by § 5799, Rev. Codes 1905, providing: "An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller as follows: . . . 3. To warrant in like manner with other agents to sell according to § 5776." And inasmuch as § 5776 provides that authority to sell personal property includes authority to warrant the quality, the principal is bound by the warranty made by an auctioneer in the sale of such property.

Auctions — warranty.

3. Following *Canham v. Plano Mfg. Co.* 3 N. D. 229, 55 N. W. 583, it is held, that the purchaser may rely upon the warranty made on sale by an auctioneer when he did not have actual or constructive notice of any restrictions on his power to warrant.

Opinion filed December 11, 1912.

Appeal by defendant from a judgment of the County Court for Stutsman County having increased jurisdiction, *Conklin, J.*, in plaintiff's favor in an action to recover the amount paid for a horse at an auction sale and for damages for breach of warranty by the auctioneer.

Affirmed.

Knauf & Knauf, for appellant.

An auctioneer, by virtue of his naked authority, has no power to warrant property sold. 3 Enc. Ev. 491; 1 Enc. Ev. 995; *Upton v.*

Suffolk County Mills, 11 Cush. 586, 59 Am. Dec. 163; The Monte Allegre, 9 Wheat. 627-630, 6 L. ed. 177, 178; Court v. Snyder, 2 Ind. App. 440, 50 Am. St. Rep. 247, 28 N. E. 719; 4 Cyc. 1041.

Evidence of instructions to auctioneer is admissible to show extent of his agency. *Bensberg v. Harris*, 46 Mo. App. 404; *Munn v. Commission Co.* 15 Johns. 44, 8 Am. Dec. 222.

The burden of proving such instructions and authority is on person seeking to hold auctioneer's principal. 10 Enc. Ev. 8, note 14.

Fact of agency not established by acts of agent, in the absence of evidence tending to show principal's knowledge or assent to such acts. *Fowlds v. Evans*, 52 Minn. 551, 54 N. W. 743; *Stewart v. Cowles*, 67 Minn. 184, 69 N. W. 694; *Crosno v. Bowser Mill Co.* 106 Mo. App. 236, 80 S. W. 275.

Agent may not go outside of his general authority. *Richmond v. Greeley*, 38 Iowa, 666.

Thorp & Chase, for respondent.

At common law an auctioneer had no authority to bind the seller by a warranty of the goods sold, unless specially instructed so to do. 4 Cyc. 1040; 3 Am. & Eng. Enc. Law, 491 (3).

But at common law, an agent (not an auctioneer) having authority to sell personal property had implied power to warrant the quality thereof, and bind his principal by such warranty, and this particularly applied to the warranty of horses. 31 Cyc. 1353; *First Nat. Bank v. Robinson*, 105 Iowa, 463, 75 N. W. 334.

Direct and positive affirmation that an animal is sound amounts to a warranty of soundness. 35 Cyc. 388; *Brown v. Bigelow*, 10 Allen, 242; *Murphy v. McGraw*, 74 Mich. 318, 41 N. W. 917; *Marsh v. Weber*, 13 Minn. 109, Gil. 99; *Hobart v. Young*, 63 Vt. 363, 12 L.R.A. 693, 21 Atl. 612.

SPALDING, Ch. J. Plaintiff and respondent purchased a horse of defendant and appellant at an auction sale of farm property, through appellant's auctioneer, one Cornwall. This action was brought to recover the amount paid for the horse, and for damages occasioned by its having the glanders when purchased, by reason of a breach of warranty made by the auctioneer. The defense was a general denial.

Verdict and judgment were in favor of the plaintiff for \$115 and costs.

Before proceeding to a consideration of the errors assigned, we think this a suitable occasion to call attention to some of the unnecessary expense of litigation, and to the rules of this court. Attorneys are becoming very lax in observing the rules governing procedure in this court, most of which are intended to reduce to the minimum the cost of litigation, and to aid the court in readily arriving at a conclusion on the merits of the different propositions presented. Rule 7 provides how cases shall be settled, and what the statement of the case shall contain when not to be tried anew in this court, and requires the evidence to be reduced to a narrative form, except in those particulars in which a transcript of part of the stenographer's minutes becomes necessary to preserve the sense or present the particular points of error, and that all superfluous matter, including all evidence not bearing upon the specifications, is to be rigorously excluded, and that the stenographer's minutes of the trial shall not constitute a statement of the case, and will not be so regarded by this court. And rule 12 provides how the abstract may be prepared, and that everything material to the question to be decided should be preserved and everything else omitted. If attorneys would observe these rules, this court would be relieved of much unnecessary labor, and litigants of a considerable portion of the expense of appeals. In the case at bar, under such rule, this court would appear to be justified in disregarding the abstract, as it appears to be practically a transcript of the evidence taken. It consists of 138 printed pages, at least four times the amount of printing necessary to raise the questions presented.

1. The first error assigned and relied upon is that there was no evidence offered, and none introduced, showing or tending to show that the defendant warranted the horse in question. We do not understand that respondent contends that the defendant personally warranted the horse, but rather that the horse was warranted by the auctioneer at the time of the sale and in making the sale, and that the defendant is bound by such warranty for a breach thereof, hence this assignment need not be noticed.

2. It is urged that there is a total failure of proof of authority on the part of the auctioneer to warrant the horse. We do not understand

that the fact of a warranty by him is questioned; at least if it is, appellant's brief contains no discussion of that subject, and the evidence is sufficient to sustain the finding which must have been made by the jury that the auctioneer did warrant the horse; so we pass to the contention that there is a failure of proof of authority to the auctioneer to warrant. Appellant cites several authorities holding that an auctioneer cannot warrant in the absence of authority so to do. The rule he relies on is undoubtedly the rule of the common law, and would prevail here in the absence of a statute, but this case must be governed by the law of this state as fixed by legislative enactment. It is very simple. Section 5799, Rev. Codes 1905, so far as applicable, provides: "An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller only as follows: . . . 3. To warrant in like manner with other agents to sell according to § 5776." Section 5776 reads: "An authority to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property."

It will be seen from the terms of § 5799 that the exceptions to the authorization of an auctioneer to warrant are negative rather than positive. This would appear to exclude the principal from the right held to apply in some cases of agency, to show secret instructions not to warrant. An attempt was made in this case to show such instructions, but appellant was not permitted to do so without showing that respondent was made aware that such instructions had been given before or at the time of purchase. This court has passed upon the law on this question, as applied to the ordinary selling agent, in *Canham v. Plano Mfg. Co.* 3 N. D. 229, 55 N. W. 583. In that case the agent's powers were restricted by written instructions. His written authorization was excluded from evidence, and it was held not to be error, in view of the purchaser having had no notice of the restriction of the agent's power, and that, if restricted in his authority, he, having possession of the property sold, would still have authority to warrant as to all persons who did not have actual or constructive notice of the restrictions upon his powers. In the case at bar the auctioneer had apparent authority to warrant the quality, the jury found he did so, and the *Canham Case* is controlling.

3. The third assignment is without merit, and goes to the necessity

of pleading and proving that the defendant authorized the auctioneer to warrant. As we have shown, this question is settled by the statute. The judgment is affirmed.

STATE v. WOODS.

(139 N. W. 321.)

Criminal law — information — amendment.

1. In the light of the provisions of § 8 of the Constitution, permitting the legislature to change, regulate, or abolish the grand jury system, and of § 9796, Rev. Codes 1905, permitting amendment of a criminal information, and of § 9930, Rev. Codes 1905, requiring the state's attorney or other prosecutor to follow a criminal trial into the county to which it is removed, and giving the court full jurisdiction and authority to hear, try, and determine the action, and to conduct it in all respects as if it had been commenced in such county, it is *held* that, in a prosecution by information, it is competent for the state, on leave of court, to amend an information in the county to which the trial is removed, at least when there is no new or different offense charged.

Appeal — presumptions — instructions.

2. Following *State v. Peltier*, 21 N. D. 190, 129 N. W. 451, it is *held* that, when error is assigned on instructions to the jury in a case in which the evidence is not before the supreme court, an instruction will not be held erroneous unless it is so under every possible view of the case, and that it will be presumed to be correct as applied to the evidence unless abstractly wrong.

Trial — instructions.

3. Certain instruction, identical in effect with one passed upon in *State v. Hazlet*, 16 N. D. 426, 113 N. W. 374, sustained.

Homicide — instructions — presumptions on appeal.

4. The appellant was charged by information with having committed the crime of murder. The court instructed the jury on the degrees of murder and of manslaughter. The jury found him guilty of manslaughter in the first degree. *Held*, that where the evidence is not before this court, it will be presumed that the instructions conformed to such evidence, and consequently that the status of the proof was such as to show that defendant was guilty of one of the degrees of murder or of manslaughter, or not guilty; and it

Note.—As to the submission of the question of lower degree to jury in prosecution for homicide, see note in 21 L.R.A.(N.S.) 18.

was not error, therefore, to omit to instruct as to the lesser offenses included within such greater offenses.

Appeal — failure to instruct — absence of request.

5. The record discloses no request for instructions on the lesser offenses. While many authorities hold that failure to instruct on a given point, when not requested so to do, is not reversible error, that question is not passed upon.

Opinion filed December 11, 1912.

Appeal by defendant from a judgment of the District Court for Adams County, *Nuchols, J.*, convicting him of manslaughter.

Affirmed.

Andrew Miller, Attorney General, *C. L. Young*, Assistant Attorney General, and *E. P. Totten*, State's Attorney for respondent.

T. R. Mockler, for appellant.

SPALDING, Ch. J. The appellant was convicted by a jury of Adams county, North Dakota, on the 22d day of April, 1911, of the crime of manslaughter in the first degree, and his punishment fixed at thirteen years in the state penitentiary, and judgment was pronounced accordingly on the 22d day of April, 1911. He appeals from the judgment, and none of the evidence is before this court.

1. The first four assignments of error, as stated in appellant's brief, all complain of the trial court permitting the state, after a change of venue had been taken from Bowman county to Adams county, to file an amended information. This objection was raised, first by objection, second by motion to set aside the amended information, third by demurrer, fourth by a motion in arrest of judgment, and fifth by objection when the court overruled appellant's motion in arrest of judgment. The contention, broadly stated, is that after a change of venue on the application of the defendant in a criminal action, granted by reason of prejudice existing in the county wherein the offense is charged to have been committed, the state cannot, before trial and in the county to which the venue has been changed, file, on leave of court, an amended information. In this case such leave was granted, the amended information filed, and the defendant arraigned thereunder and required to plead thereto, and was tried and convicted on such amended infor-

mation. We may remark in passing that the amended information charged the same offense that was charged, or attempted to be charged, in the original information, *viz.*, murder. It is urged that the duties of the state's attorney of Bowman county can only be exercised within that county; that an official act performed in Adams county by him after a change of venue on the application of the defendant, such as preparing and filing an amended information, is outside his jurisdiction, illegal, and of no effect.

Counsel concedes that he has been able to find but one case which is an authority upon the subject. It is *State v. Bartlett*, 170 Mo. 658, 59 L.R.A. 761, 71 S. W. 148. The Constitution of Missouri, adopted in 1900, provides that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies." And it is held in the above entitled case that after change of venue the prosecuting attorney cannot file, in the county to which the venue is changed, an amended information. That decision rests upon the provision of the Constitution that indictment and information "shall be concurrent remedies," and the court holds that, inasmuch as an indictment could not be found for a crime committed outside the county in which the grand jury sits, an information cannot be filed outside the county of the prosecuting attorney, and therefore that it cannot be amended by such attorney in the county to which the venue is changed; that the fact that the statute commands a prosecuting attorney to follow to other counties indictments and informations originating in his county does not enlarge his powers as to amending an information any more than it does to amending an indictment. We think this decision is not an authority in this state. Our constitutional provision differs widely from that of Missouri. It does not provide that indictment and information shall be concurrent remedies, but leaves it wholly within the power of the legislative assembly to completely abolish proceeding by indictment.

Section 8 reads: "Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment. . . . Offenses shall be prosecuted by indictment or information. The legislative assembly may change, regulate, or abolish the grand jury system." Under the provisions of our Criminal Code felonies are prosecuted on information, except when a grand jury may

be summoned in the manner and by the officials or persons designated. Section 9796 provides for the amendment of an information. Section 9930 provides that when the place of trial has been changed, the state's attorney of the county or judicial subdivision, or other person appointed to prosecute where the action was commenced, shall prosecute the case for the state, and the court to which the action is removed for trial shall have full jurisdiction and authority to hear, try, and determine the action, and upon conviction to impose the punishment prescribed by law, and that the trial shall be conducted in all respects as if the action had been commenced in the county to which it is removed. It seems reasonably clear that full jurisdiction and authority to hear, try and determine the action, to impose punishment, and to conduct the trial in all respects as if the action had been commenced in said court, must include all the necessary steps leading to and including the trial, after the venue has been changed. The reasons for not permitting an indictment to be filed in the county to which the venue is changed do not necessarily apply to the amendment of an information. The grand jury is a body of men summoned from, and having jurisdiction only in, its own county. It meets, transacts its business, and is discharged. It is not at all times in attendance upon the court; it does not follow the case out of the county; its functions cease when it is discharged, and this is usually long before the end of the term for which it was called. But the prosecuting attorney is commanded by the statute to follow the case into the new county and there prosecute it, and there is no physical or other barrier in the way of his amending the information, on leave of court, as there is to the amendment of an indictment. 1 Bishop, New Crim. Proc. § 714.

The word "concurrent" has various meanings. It is true prosecution by indictment and information in this state are concurrent remedies in the sense that they are of equal dignity, of equal importance, and that under certain circumstances they apply to the same object or offense, but they are not concurrent in the sense that procedure by indictment or by information may be adopted on any offense at any time. The grand jury is not called on every occasion when felonies are to be prosecuted. The state's attorney is not charged with any duty respecting the calling of a grand jury. Whether there shall be a grand jury in his county at any term of court in no manner depends upon him offi-

cially under the statute. Hence, if the officials or persons empowered by the statute to call a grand jury do not act, no method of procedure except by information is left the state's attorney. These remedies in this state are concurrent in the sense that they bear on the same objects or offenses, but are not concurrent in the sense that they exist at the same time or on the same occasion.

It appears that § 4860, Ballinger's Anno. Codes & Stat. (Wash.), provides that the court to which an action or proceeding is transferred has and exercises over the same a like jurisdiction as if it had been originally commenced therein; and in *State v. Lyts*, 25 Wash. 347, 65 Pac. 530, the court sustains a conviction on an information amended after change of venue and in the county to which the case was transferred. Its decision is placed upon § 4860, *supra*, and holds that the court to which the venue is changed has the same jurisdiction over the action transferred as if it had been originally commenced therein, and that an information is amendable therein by the prosecuting attorney on leave of court. It would be indeed a strange oversight of the legislature if it had not been intended that § 9930 should govern in cases of this nature. It would result in the absurd proposition that after the trial has been transferred to another county on the application of the defendant, and the state finds it necessary, on the trial, to make a change in form of the information, proceedings must be suspended or the court adjourned, the state's attorney return to the county of which he is an official and there make his amendment, and then have it transmitted to the county in which the trial is to occur. We think no such procedure was contemplated or intended to stand in the way of or interfere with the orderly and speedy administration of justice, and we hold that the amendment was properly allowed.

2. The court, among other things, instructed the jury that "if the state has proven to your satisfaction, beyond a reasonable doubt, that the defendant killed Adelbert Stone Crow at the time and place specified in the information in this case, then the burden devolves upon the defendant to prove circumstances that justified the killing, in order to entitle defendant to be acquitted on the ground of self-defense, unless the proof on the part of the prosecution tends to show circumstances creating a reasonable doubt as to whether or not such killing was justified, and if, upon the whole evidence, you have a rea-

sonable doubt as to whether or not the defendant acted in self-defense, it is your duty to find the defendant not guilty." It is complained that this charge leaves out of consideration two important elements mentioned in § 10,023, Rev. Codes, 1905, *viz.*, mitigation and excuse, and thereby took from the consideration of the jury these elements. It was held in *State v. Peltier*, 21 N. D. 190, 129 N. W. 451, that when the evidence is not before this court on a criminal appeal, an instruction will not be held erroneous unless it is so under every possible view of the case, and that if not, it will be presumed to be correct under the circumstances and as applied to the evidence, unless abstractly wrong. This rule applies in the instant case. We have nothing before us to show that there was any evidence submitted tending in any manner to mitigate or excuse the offense. If no such evidence was submitted, then the court was not called upon to instruct on these subjects. *People v. Ah Kong*, 49 Cal. 6. And the evidence not being before us, we must assume that there was none tending to show these defenses. To the next error assigned, the same rule and *State v. Peltier*, *supra*, are applicable, and no further reference thereto is necessary.

3. The next assignment relates to that part of the charge wherein the court said: "That defendant believed himself to be in danger from deceased is not enough to justify defendant in killing deceased, unless, from all the facts and circumstances known to defendant, or believed by him to be true, the jury can say he had reasonable ground for such belief; but if, from all the facts and circumstances known to defendant, or believed by him to be true, you as jurors can say that defendant had reasonable ground to believe that he was in imminent danger of great personal injury from the deceased, that he was justified in killing deceased, you should find defendant not guilty." This instruction was apparently framed on an instruction considered in *State v. Hazlet*, 16 N. D. 426, 113 N. W. 374. The instructions are identical in effect, and practically so in form. It was there held by a majority of this court to be correct, and the subject need not be rediscussed in this opinion.

4. The final assignment discussed by appellant relates to the failure of the court to instruct the jury that they could convict appellant of murder in the first degree, murder in the second degree, manslaughter

in the first degree, manslaughter in the second degree, assault with intent to commit any felony, assault with a deadly weapon, assault with a dangerous weapon, assault with intent to kill, assault and battery, and simple assault. The court did instruct the jury as to what constitutes the crimes of murder, manslaughter in the first degree, and manslaughter in the second degree, and advised them relating to their duties as indicated by the evidence, should they find it brought the offense within either of these definitions. Still bearing in mind that the evidence is not here, we must also assume that this instruction was correct, on the theory that, on the evidence in the case, the defendant was guilty of one of the degrees of murder or of manslaughter in the first or second degree, or was not guilty of any crime.

This court does not seem to have passed directly upon the necessity to instruct in all cases upon the lesser offenses, but, as indicated, when the evidence is not before this court, it will be presumed that the instructions conformed to the evidence submitted, and that therefore the status of the proof at the close of the trial was such as to show that defendant was guilty of one of the degrees of murder or of manslaughter, or not guilty of any offense; and in this case it would not be error to omit to instruct as to lesser offenses included within the two degrees of murder and the two degrees of manslaughter. Sections 10,051 and 10,053, Rev. Codes 1905, are the provisions applicable, and they are identical in effect, and nearly so in language, with the corresponding provisions of the statute of our sister state, South Dakota. The supreme court of that state has repeatedly passed upon it. The 1st section named provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty. Whenever a verdict of guilty is rendered against the accused upon a prosecution for homicide, the jury must find the degree thereof, and determine by their verdict the punishment to be inflicted, within the limits prescribed by law."

And the 2d section referred to: "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the information or indictment, or of an attempt to commit the offense." In the case at bar the court instructed the jury as to the different degrees, both of murder and manslaughter.

In *State v. Kapelino*, 20 S. D. 591, 108 N. W. 335, on a trial for assault with a deadly weapon with intent to murder, where the jury found the defendant guilty of assault with intent to do bodily harm with a sharp or dangerous weapon, it was held that the court properly refused to instruct that the jury might convict of assault and battery simply, as under the evidence the jury would not have been warranted in finding him guilty of a simple assault.

In *State v. Vey*, 21 S. D. 612, 114 N. W. 719, on a trial for homicide, where the evidence showed the accused was either guilty of murder or was not guilty of any offense, the court held that, where the offense charged is not divided into degrees, the court is not required to charge the jury as to an offense that might be included in the charge made, but which the evidence would not warrant.

In *Territory v. Gay*, 2 Dak. 125, 2 N. W. 477, it was held that upon a trial for murder, the killing by means of a deadly weapon being admitted, and there being in fact no legal or competent evidence tending to excuse or justify the killing, it was not error to instruct the jury that there was no evidence whatever, admitting every word to be true, that will excuse the killing, and that therefore it was not error for the court to instruct the jury that if they regarded the oaths they had taken, their verdict must be murder or manslaughter.

In support of our conclusion on this point, see also *People v. Scott*, 93 Cal. 516, 29 Pac. 123, holding that, where the evidence is of such a character as to show defendant, charged with an assault with intent to commit murder, was either justifiable, or guilty of a graver offense than a simple assault, the court was not required to give an instruction that he could be convicted of a simple assault, especially if no such instruction was requested.

And in *People v. Barney*, 114 Cal. 554, 47 Pac. 41, it was held that failure to instruct on the minor offense was not error when it clearly appeared from the evidence that the defendant was guilty of the offense charged, or not guilty at all; and second, for the reason that no request for such instruction was made. To the same effect, see *People v. Arnold*, 116 Cal. 682, 48 Pac. 803.

The conclusion reached by us is also supported by a long list of authorities appended to § 190, *Blashfield's Instruction to Juries*, as well as by the text. It will there be seen that in some states it is held that

the practice of laying down general principles relating to the offense charged in all its degrees, without reference to the evidence in the case, is objectionable as tending to confuse and perplex the jury. And that if the evidence shows that the offense of the accused is either murder in the first degree or homicide in self-defense, and the jury convict of murder in the first degree, an uncalled-for instruction on murder in the second degree cannot injure the accused. See also § 191.

We have examined with care a very extended list of authorities cited by appellant, and said to sustain his assignment of error on this point, but are unable to read any of them as doing so. Practically all of them are cases in which the evidence was before the appellate court, and in which it is disclosed that there was evidence entitled to greater or less weight on which the jury could have found the defendant guilty of one of the lesser offenses; and many of them contain expressions directly negating the contention of appellant in the case at bar. As an illustration, without reviewing such authorities at length, in *State v. McPhail*, 39 Wash. 199, 81 Pac. 683, the syllabus states: "Where there is any evidence proving an inferior degree of crime charged in the information, the court must submit it by proper instructions; but if there is no testimony proving a lesser crime, the court is not required to submit it." And in *State v. Cody*, 18 Or. 506, 23 Pac. 891, 24 Pac. 895, the court limits its holding that the law should be given the jury as to the lesser offenses to cases in which there is any question as to accused being guilty of the greater.

6. We call attention to another reason which might be held to sustain the judgment of the trial court, but find it unnecessary to pass upon it at this time. This court held in *State v. Haynes*, 7 N. D. 352, 75 N. W. 267, that, although it would have been correct practice to have submitted instructions as to the law governing a phase of the case, failure to instruct when not requested is not reversible error. See also *State v. Johnson*, 8 Iowa, 525, 74 Am. Dec. 321, and *Territory v. Bannigan*, 1 Dak. 451, 46 N. W. 597, and *State v. Vierck*, 23 S. D. 166, 139 Am. St. Rep. 1040, 120 N. W. 1098; *State v. Sutterfield*, 22 S. D. 584, 119 N. W. 548.

Finding no reversible error in the record before this court, the judgment is affirmed.

STATE v. MOELLER.

(138 N. W. 981.)

Evidence — former testimony.

1. Upon a former trial of this action in the district court, one Dr. E. was a witness for the state. He was asked a question upon cross-examination to which an objection was sustained by the trial court, which ruling was held to be error by this court upon a former appeal. At the present trial below, the said Dr. E. was outside of the jurisdiction of the trial court, and his testimony was given by the official reporter of the former trial from his shorthand notes. Appellant contends that this testimony was improperly admitted, because he had no opportunity to cross-examine the witness upon the former trial. However, the statement of the case shows that substantially the same question was asked the doctor upon the former trial, and that he answered the same without objection. The statement of the case upon the former appeal being narrated and much abbreviated, and the state, failing to call the facts to the attention of the court, misled this court at that time. Under the facts now shown, it is held that defendant had a full opportunity to cross-examine the witness upon the former trial, and that this objection to the testimony upon the second trial upon that ground was properly overruled.

Accomplice — question for jury — evidence — instructions.

2. Whether one Dale was an accomplice with defendant in the commission of the defense, and whether his acts as such in furtherance of the common object tended to show the guilt of defendant, were facts for the jury to determine, and the testimony offered at the trial of acts done by Dale in furtherance of such common purpose towards the commission of the offense was properly admitted, and the instructions of the trial court were full, fair, and accurate.

Expert testimony — hypothetical questions.

3. Dr. W., sworn as an expert, was asked two hypothetical questions based upon the testimony of all the state's witnesses, including that of Dr. E., and calling for his opinion as to the cause of the death. *Held*, that the questions were proper, the testimony of Dr. E. being held properly admitted in paragraph one.

Appeal — argument of state's attorney — objection.

4. The assistant state's attorney, during his remarks to the jury in summing up the case, referred to the defendant as a "professional abortionist," "a moloch who kills unborn children for the almighty dollar," etc., but the defendant's attorneys "did not care to interrupt the argument," and did

not give the trial court any opportunity to stop the language or rebuke counsel, but made the objection after the argument had ceased. *Held*, following *State v. Knudson*, 21 N. D. 562, 132 N. W. 149, that this court will not reverse the trial court for objectionable language of counsel not called to his attention by timely objection.

Opinion filed June 29, 1912. On rehearing December 16, 1912.

Appeal by defendant from a judgment of the District Court for Ward County, *Leighton, J.*, convicting him of murder.

Affirmed.

Palda, Aaker, & Greene, for appellant.

D. L. Nash, State's Attorney, for respondent.

BURKE, J. Defendant stands convicted of murder in the second degree, it being alleged that he caused the death of a certain young woman upon whom he performed a criminal operation. This is his second conviction, the first having been set aside by this court. See same title, 20 N. D. 114, 126 N. W. 568. At this time he does not challenge the sufficiency of the evidence received to sustain the conviction, but complains of certain rulings of the trial court and misconduct of the assistant prosecuting attorney. Owing to the excellent presentation of this appeal, we are able to dispose of the case with the minimum amount of labor. Appellant groups his assignments of error under four heads, and we will dispose of them in order.

(1) Upon the first trial of this case, one Dr. Engstad was sworn as a witness and testified that he had examined the girl some six days prior to her death, and had found her in robust health. Upon his cross-examination he was asked by appellant's attorneys whether an infection caused by an injury to the uterus might not remain dormant a greater or less period of time before it spread out and gave evidence of its presence. This question was objected to by the state, and the objection sustained. In the former opinion this court held that this ruling was error; the said ruling being based upon the statement of the testimony at that time presented; it being deemed proper to show that the girl might have already inflicted upon herself the wound that caused her death, and that the doctor was mistaken in stating that her health was good at the time he examined her. At that trial, however,

the testimony of the doctor was narrated, and this court, not having had its attention called thereto, was misled and made the ruling alleged; but at the present time it appears from a fuller statement of the testimony that practically the same question had been asked the doctor, and that he had answered it without objection from the state. Thus, the ruling of the trial court in the former trial was error, if at all, without prejudice. All of this becomes relevant to this appeal when we find that upon the present trial Dr. Engstad was out of the state and could not be found. His testimony given upon the former trial was thereupon offered in evidence to prove the same facts. Appellant does not seriously dispute that the testimony of the doctor taken at the former trial might have been used if a proper foundation were laid therefor, but insists that such foundation was not laid. In particular they assert that upon the first trial defendant was denied the right to fully and fairly cross-examine Dr. Engstad. As we have already shown this is apparently so only. It thus follows that the testimony of the doctor taken upon the former trial was admissible.

(2) The second group of errors relates to the admission of certain testimony showing acts of one Dale, whom the state alleges to be a fellow conspirator with the defendant and the girl in procuring the abortion. Objection is also made to the instruction of the trial court in mentioning conspiracy at all. Dale, it is alleged, was the man responsible for the pregnancy of the girl. It was shown at the trial that he came to Minot a day before the girl, and engaged the room at the hotel wherein she died; and that he was seen in consultation with the defendant; that he bought for the use of the girl and doctor certain articles, such as distilled water, that were found later in the girl's room; that he was seen frequently in the room just before her death; that he was seen carrying the slop jar from the room, and that it was afterwards found to be bloody; that when the girl died defendant sent a man across country 60 miles to bring Dale into Minot. Defendant admitted that Dale was the person who had asked him to attend the sick girl. All of these acts took place between the 3d and 7th of October. Upon these facts the trial court instructed the jury that they might consider the acts of Dale only if they found a conspiracy existed, and that, if they did not find such conspiracy, the actions of Dale should be disregarded. We believe that testimony was properly ad-

mitted and that the instructions of the court were proper. All of the acts were in furtherance of the offense and part of the *res gestæ*. The statements of Dale not so related to the offense, and which were condemned by this court upon the first appeal, were not offered upon this trial. For a full discussion of this subject, see the famous Anarchist Case, *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570, 3 Am. St. Rep. 320 (note at page 478).

(3) The next group of assignments of error relates to two hypothetical questions asked of the expert Dr. White. In paragraph one we have held that the testimony of Dr. Engstad, given upon the first trial, was properly received at the second trial. After this question had been received Dr. White was asked a very lengthy hypothetical question based upon the assumption that all of the state's evidence, including Dr. Engstad's, was true. The material parts of Dr. Engstad's testimony were that the girl had called upon him October 1st, and had been by him examined with the result that he found nothing wrong with her lungs, heart, or other organs, and that she appeared to him to be in excellent health. He had seen her a day or two later upon the street with a satchel going towards the Great Northern depot, and she seemed in good health. He also testified that she had no temperature upon the first examination, and that she was pregnant. All of these facts were assumed as correct in the question asked Dr. White, and were well within the rules. Then Dr. White was asked, "In your opinion, assuming these facts to be true, what was the cause of death?" Of course, the testimony of all the witnesses in the case was included in the first question and also in the second. As we have already held the admission of Dr. Engstad's testimony proper, the principal ground of complaint is disposed of. There was plenty of evidence to justify the questions, and the competency of Dr. White is conceded. Therefore there was no error in allowing him to answer. To be true Dr. Engstad admitted the possibility that the girl might have been carrying the germs that caused her death at the time of his examination, but he says that it was a *possibility* only, and not a probability. Until mankind is much farther along upon the road to learning, it will not be safe to disregard the testimony of a witness because he admits the possibility of an error in his judgment.

(4) This brings us to the final group of assignments. It relates

to alleged misconduct of an attorney who was assisting the state's attorney during the trial. This attorney, Mr. Sinkler, in closing his remarks to the jury, used language of which defendant now complains. It will not be necessary to set much of it out in this opinion, but the gist of the statement is as follows: "A moloch who kills unborn children for the sake of the almighty dollar," "professional abortionist," etc. It is claimed that these statements are not supported by evidence and prejudicial to the defendant. The conduct of the state's attorney and his assistants should be dignified, truthful, and honorable, and yet vigorous and convincing. It is hard to lay down fast rules to cover every possibility that may arise. The state's attorney may be driven to make indiscreet statements by taunts of opposing counsel, or he may be induced to make passionate remarks by some action of the defendant himself. In the case at bar it appears from Mr. Sinkler's remarks that the defendant had smiled at some of his statements made to the jury. In the heat of combat something may be said or done that needs correction. The trial court is there for that purpose. If the state's attorney makes remarks such as the above, the defendant must make complaint at once, or the trial court may conclude that they are not objectionable. In the case at bar no complaint was made to the trial court, because, as counsel states, "he did not care to interfere with the argument." Some attorneys take swift advantage of the sympathy of the jury for anyone in trouble, and use the remarks of the state's attorney as a basis for a "fair-play" appeal to the jury. In the absence of complaint, the court may have assumed that such was the intention of defendant's attorneys. The matter is one largely in the discretion of the trial court, who heard all of the argument, and heard and saw the possible provocation. This court in the case of *State v. Knudson*, 21 N. D. 562, 132 N. W. 149, has passed squarely upon this point, and we see no reason to disagree with the rules therein established. Without approving of the remarks made, we must decline to reverse the case in the absence of timely objection and a ruling by the trial court. The other assignments of error are covered by the foregoing, or are unsupported in appellant's brief. Finding no error, the judgment is affirmed.

Goss, J. disqualified. NICHOLS, District Judge, sitting in his stead.

On Rehearing.

PER CURIAM. On the former appeal of this case we hold that a certain ruling excluding an answer to a question propounded by the defendant's counsel to the witness, Dr. Engstad, on cross-examination, constituted error. This holding was made toward the end of the opinion, and after other controlling questions had been decided in defendant's favor necessitating a new trial, and was in the nature of a pronouncement upon a rule of evidence for the guidance of the lower court on the second trial. It was unnecessary to the decision that we should have determined whether, in the light of the whole record, such ruling was prejudicial; nor was this phase of such ruling argued by counsel or considered by the court. Moreover, the record on the former appeal gives the testimony only in the narrative form, while, on the present appeal, it is set out fully by questions and answers. Our attention was not called to this fact by counsel. These facts are sufficient to explain our oversight on the former appeal, if, indeed, it can correctly be contended that we there in effect held such error prejudicial. Notwithstanding these facts, and conceding, for the sake of argument, that a fair interpretation of our former decision leads to the conclusion that we held such ruling to be prejudicial error, it does not follow as a necessary conclusion that such ruling is, on this appeal, controlling and decisive, or that it was controlling and decisive in the trial court under the doctrine of the law of the case upon the question here presented as to whether a sufficient preliminary foundation had been laid for the introduction of the former testimony of Dr. Engstad, by showing that, as a matter of fact, a full and fair opportunity was afforded the defendant for cross-examination of such witness at the former trial. The question thus decided on the former appeal is not the *same* question confronting us on this appeal, and the doctrine of the law of the case so earnestly invoked by appellant's counsel is not applicable. The question thus before us on the former appeal involved the correctness of a ruling upon a certain objection to a specific interrogatory propounded to the witness Engstad, and, if found to be erroneous, then, perhaps, whether such ruling was prejudicial to the defendant. The precise question confronting us on this appeal not only was not raised, but it could not have been raised, on the former

appeal. It involves the question, as before stated, as to whether, as a matter of fact as disclosed by the entire record, the defendant was accorded a full and fair opportunity to cross-examine such witness. While the questions are, in a sense, closely related, we are clear that there is nothing in the former decision on this point which can correctly be said to be binding on us on the present appeal.

In the light of the record clearly disclosing that the subject embraced in the question thus propounded to Dr. Engstad was in substance and effect fully covered by other questions and answers not objected to, we are forced to conclude that a full and fair opportunity was in fact accorded defendant for cross-examination, and consequently a sufficient foundation in this respect was laid for the introduction of such testimony on the last trial.

The question now attempted for the first time to be raised in this court, that a proper foundation was not laid for the introduction of Engstad's testimony by showing his absence from the jurisdiction of the court, will not be considered, as such question comes too late. The judgment is affirmed.

UPDEGRAFF v. TUCKER.

(139 N. W. 366.)

Appeal — findings of fact by trial court.

1. In an action at law where a jury has been waived, the findings of fact of the trial court have the force of a verdict, and such findings will not be disturbed when they have substantial support in the evidence.

Appeal — statement — sufficiency.

2. On an appeal from an order denying a motion for a new trial on the grounds of alleged insufficiency of the evidence to sustain the findings of fact, and of alleged errors of law occurring at the trial,

Held, that a failure of the appellant to incorporate in the statement of the case a specification of the particulars wherein such evidence is alleged to be insufficient, and of such alleged errors of law, requires us, as well as the trial court, to disregard such statement, under the provisions of § 7058, Rev. Codes, 1905.

Appeal — review of evidence — affirmance.

3. Notwithstanding appellant's failure to incorporate any specifications of particulars in the settled statement as required by § 7058, Rev. Codes, the evidence has been examined, and it is *held* that the findings of fact are amply supported thereby.

Opinion filed December 18, 1912.

Appeal by plaintiff from an order of the County Court for Stutsman County, *J. U. Hemmi*, County Judge, denying his motion for a new trial in an action brought to recover a balance claimed to be due for services.

Affirmed.

C. S. Buck, for appellant.

George H. Stillman, for respondent.

FISK, J. This action was tried in the county court of Stutsman county and resulted in a judgment for the defendant. A motion for a new trial was made and denied, and the appeal is from the order denying such motion. The action was brought to recover a balance claimed to be due plaintiff from defendant for services rendered and expenses incurred under an alleged promise on defendant's part to pay the plaintiff therefor. Defendant denies any personal liability, and in effect alleges that, in employing the plaintiff, he acted not in a personal capacity, but as the representative and agent of certain principals, and this with plaintiff's full knowledge. The issues are clearly defined in the pleadings. A jury was waived by the parties, and at the conclusion of the trial the county judge made findings of fact and conclusions of law favorable to the defendant. Such findings of fact are, of course, conclusive in this court, if there is any substantial conflict in the evidence. We have examined the record with care, and are fully convinced that such findings are in accordance with the weight of the testimony, and must therefore be accepted as final in this court.

Such findings of fact are as follows: "The court finds that in each of the following named towns, to wit, Fargo, Casselton, Courtenay, Carrington, Fessenden, Valley City, Jamestown, and Grand Forks, there was, at the time of the making of the contract set forth in the

complaint of the plaintiff, and still is, a corporation for the purpose of maintaining and having horse races in the several towns named. That the said several corporations annually elected or chose a person or representative to act for said corporation in connection with a representative from each of the other towns, for the purpose of advertising races for the 'circuit,' and employing a start or starters for the races to be held in the several towns, and to fix the dates, of such races so that there would be no conflict, and such other matters as might be incident thereto. That the several representatives, so chosen by the several corporations, organized by electing a president, a secretary, a treasurer, and other officers, and they styled themselves 'Central Circuit Association of North Dakota,' which was an unincorporated body. The business of this Central Circuit Association was almost entirely given over to the secretary. That at all times mentioned in the complaint in this case, the defendant, H. N. Tucker, was such secretary. That on or about May 28th, 1909, said defendant opened correspondence with said plaintiff for the purpose of employing the plaintiff as a starter for the races in the several towns in said circuit for the year 1909, and that agreement was finally entered into by and between them, whereby the said plaintiff was to act and be the starter of the races in six of the towns named, to wit, Casselton, Valley City, Courtenay, Fessenden, Carrington, and Jamestown, at a salary of \$50 for each town and actual expenses prorated. That when employing the said plaintiff, said defendant styled himself 'secretary.' That the plaintiff well knew at the time of said employment, and afterwards, that he was acting for, and in behalf of, the several corporations in the several towns above named. That, in pursuance of said agreement and arrangement, the plaintiff acted as such starter in the six towns last above mentioned, and that the racing corporations in each of said towns accepted his services and each paid him \$50 and \$14 for one week's board, except the association in the town of Casselton, which town paid him only \$50 and nothing for expenses. That the defendant received no money from any of these corporations to pay the plaintiff, but that the several corporations paid the plaintiff all the money that he received. That the plaintiff well knew that at the time he entered into the arrangements with the defendant, there were such racing corporations in each of the several towns, and that

they raised the funds to pay the expenses of races and other expenses in connection therewith in the several towns named.

"The court finds, further, that the defendant was acting as an agent for the several corporations, and not in his individual capacity at the time he employed the plaintiff to act as starter, and that the several racing corporations in the six towns mentioned accepted his (plaintiff's) services and paid him the amount agreed upon, to wit, \$50 in each town and \$14 for board (except the town of Casselton, which paid only \$50), but that none of them paid the plaintiff any sum for railroad fare or other necessary expenses, or any part thereof."

Such findings of fact are not only amply sustained by the evidence, but their correctness is not properly challenged by the plaintiff. The only specification of particulars wherein the evidence is alleged to be insufficient to sustain such findings, is as follows:

"The plaintiff alleges that the evidence in this case is insufficient to justify the findings of fact and conclusions of law made by the court." Manifestly this is no specification of particulars at all, nor is there any attempt whatever to specify any particular errors of law in the settled statement of the case. These being the only statutory grounds urged for a new trial, it is well settled that neither the court below nor this court can afford relief to appellant. The statute (§ 7058, Rev. Codes, 1905) is plain and specific to the effect that such specifications of particulars must be incorporated in the settled statement, and that where no such specifications are made, the statement shall be disregarded on motion for a new trial and on appeal.

This renders a consideration of the appellant's contentions and authorities unnecessary, there being no serious contention that the facts as found do not warrant the conclusions of the trial court.

Order affirmed.

B. F. SPALDING, I express no opinion on the sufficiency of the evidence to sustain the findings.

STATE EX REL. VIKING TOWNSHIP v. MIKKELSON,
Treasurer of Richland County, North Dakota.

(139 N. W. 525.)

Interest and penalty amounting to \$185 was collected upon a special assessment levied against relator township to reimburse for special benefits accruing to highways therein from a drain constructed. The county treasurer, under the order of the county commissioners of Richland county, transferred the interest and penalty so collected into a county building fund. The treasurer refused, on demand, to retransfer the same and credit it as a part of the drain fund to create which fund the assessment was levied and collected. On mandamus to compel such retransfer of the penalty and interest collection it is *held*:

Delinquent drainage assessment against township — interest and penalty.

1. Prior to the Session Laws of 1911 no authority existed, before or in the absence of a sale, for the collection of any interest and penalty on special drain assessments; and the township relator could have legally refused to pay the interest and penalty collected, but instead voluntarily paid it.

Delinquent drainage assessment — penalty — transfer to other fund.

2. That the interest and penalty was so paid as a part of a drain assessment, and into a particular drain fund, and as between the county and such fund it must there remain until disbursed for drainage purposes, it not being the property of the county, nor subject to transfer by it from said fund or to any other fund than the one into which it was voluntarily paid by such payment to the county treasurer, the custodian of and treasurer for the drain fund under § 1832 of the Revised Codes of 1905, as amended at page 127 of the Session Laws of 1907.

Delinquent drainage assessment — voluntary overpayment — application of.

3. The relator township, having voluntarily made an overpayment of the special assessment, still has an interest therein to the extent of possessing a right to have such overpayment applied to the purposes for which it was paid and for which the particular drain fund was created.

Drainage fund — trust — diversion.

4. The entire fund, so created from special assessments for drainage, constitutes a trust fund to be applied to the purposes only for which it was created and collected; and the county is the trustee thereof for the purposes of such collection and the application thereof to such purposes, but is without legal authority to divert the same to other uses.

Delinquent special assessment — interest and penalty.

5. Section 1575, Rev. Codes, 1905, providing that interest and penalty collected on delinquent taxes shall belong to the county, has no application to interest and penalty collected upon delinquent special assessments. Special assessments are not taxes within the meaning of such general tax provision.

Delinquent assessment — interest and penalty — validity — who may question.

6. As between the county treasurer and the relator, the former cannot be heard to question the legality of this collection of penalty and interest, nor assert that the same was collected without authority of law. He having collected and received this money to be credited to the particular drain fund, he must so credit it, and the county is without interest in said collection other than to see that the same is so credited and applied.

Delinquent assessment — interest and penalty.

7. The collection of 7 per cent interest ordered in the opinion in Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433, recently decided, concerning interest to be collected after a sale adjudged void, to reimburse the county for refunds of amounts received on sale with 7 per cent, under § 1705, Rev. Codes 1905, has no application to any collections made as penalty and interest in the absence of a sale.

Defect of parties — waiver.

8. By going to trial upon the merits on an issue arising under a complaint and answer, appellant has waived any right to insist upon a defect of parties defendant in that the county was not joined as codefendant in this proceeding.

Mandamus.

9. Mandamus is held to be the proper remedy.

Opinion filed December 19, 1912.

Appeal by defendant from a judgment awarding a peremptory writ of mandamus against him; *Allen, J.*

Affirmed.

Charles E. Wolfe and *Joseph G. Forbes*, for appellant.

No interest or penalty on special assessments or taxes can be charged or collected, in the absence of a statute expressly providing for such interest and penalty. 1 Page & J. Taxation by Special Assessment. § 475, p. 721; Cooley, Taxn. 2d ed. pp. 17, 346; 25 Am. & Eng. Enc. Law, 1231; 27 Am. & Eng. Enc. Law. 777; Elliott v. East Pennsylvania R. Co. 99 U. S. 573, 25 L. ed. 292; 27 Am. & Eng. Enc. Law, 777; Cooley, Taxn. 2d ed. p. 459.

All interest and penalty collected by appellant was properly turned over to the county. *Fargo v. Ross*, 11 N. D. 369, 92 N. W. 449.

Courts will not in a mandamus proceeding declare laws unconstitutional. 19 Am. & Eng. Enc. Law, 763; 26 Cyc. 156; *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565; *High*, Extr. Legal Rem. 2d ed. 143; *People v. San Francisco*, 20 Cal. 592; *Smyth v. Titcomb*, 31 Me. 272; *People ex rel. Bradley v. Stevens*, 2 Abb. Pr. N. S. 348; *Maxwell v. Burton*, 2 Utah, 599.

If respondent is entitled to recover the particular penalty and interest paid by it, it has an adequate remedy at law, and no right to maintain this proceeding by mandamus. 19 Am. & Eng. Enc. Law, 745; 26 Cyc. 168, 172, and cases cited; *Byles v. Golden Twp.* 52 Mich. 612, 18 N. W. 383; *People ex rel. Migatt v. Chinango County*, 11 N. Y. 571; *Davis v. Jewett*, 69 Kan. 651, 77 Pac. 704.

That portion of penalty and interest paid out or disbursed, even though collected by appellant, cannot be reached in this proceeding. *Board of Education v. Bladen*, 113 N. C. 379, 18 S. E. 661; *Minneapolis & St. L. R. Co. v. Becket*, 75 Iowa, 183, 39 N. W. 260; *Frey v. Fond du Lac*, 24 Wis. 204; *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732; *Redding v. Bell*, 4 Cal. 333; *Day v. Callow*, 39 Cal. 593; *Rice v. Walker*, 44 Iowa, 458.

Pierce, Tenneson, & Cupler, for respondent.

Mandamus was the proper remedy to compel the transfer of the money to the drainage fund and prevent its misapplication. 26 Cyc. 304, 334, 338, note 24; *State ex rel. Donnelly v. Hobe*, 106 Wis. 411, 82 N. W. 336; *Smith v. Frankfort*, 2 Kan. App. 411, 42 Pac. 1003; *Merrill, Mandamus*, §§ 109, 134; *People ex rel. Atty. Gen. v. Reis*, 76 Cal. 269, 18 Pac. 309.

No demand upon respondent to transfer the money was necessary, as this was a public duty owed by him. *Merrill, Mandamus*, § 294; 26 Cyc. 468.

Writ is proper to compel an officer to transfer funds from one account to another. *State v. Stone*, 69 Ala. 206; *Camron v. Weil*, 57 Cal. 547; *Potter v. Fowler*, 78 Cal. 493, 21 Pac. 118.

Penalty and interest follow the tax. *Howe v. Bradley*, 19 Me. 36; *Woerz v. Schumacher*, 37 App. Div. 374, 56 N. Y. Supp. 11; 37 Cyc. 1594; *Farmers' Alliance Mut. F. Ins. Co. v. Trombly*, 17 Colo.

24 N. D.—12.

App. 513, 69 Pac. 74; *Arapahoe County v. Denver*, 30 Colo. 13, 69 Pac. 586; *Tacoma School Dist. v. Hedges*, 13 Wash. 69, 42 Pac. 522; 27 Am. & Eng. Enc. Law, 778.

Section 1575, Rev. Codes 1905, does not give the interest and penalty to the county. *Murphy v. People*, 120 Ill. 234, 11 N. E. 205; *Allen v. Galveston*, 51 Tex. 320; *Vallely v. Park Comrs.* 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615; *Rolph v. Fargo*, 7 N. D. 651, 42 L.R.A. 646, 76 N. W. 242; see also *Freeman v. Trimble*, 21 N. D. 1, 129 N. W. 83; *San Diego v. Linda Vista Irrig. Dist.* 108 Cal. 189, 35 L.R.A. 37, 41 Pac. 291; *Gould v. Baltimore*, 59 Md. 379; *Smith v. Abington Sav. Bank*, 165 Mass. 285, 42 N. E. 1133; *Bolling v. Stokes*, 2 Leigh, 178, 21 Am. Dec. 605; *Stephani v. Catholic Bishop*, 2 Ill. App. 252; *Ittner v. Robinson*, 35 Neb. 133, 52 N. W. 847.

Questions of constitutionality can be determined in mandamus proceedings. 13 Enc. Pl. & Pr. 496; See *Merrill, Mandamus*, § 65.

Taxes paid voluntarily, and even under mistake of law, cannot be recovered back. 37 Cyc. 1178, 1180; *St. Anthony & D. Elevator Co. v. Bottineau County* (*St. Anthony & D. Elevator Co. v. Soucie*) 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212.

Respondent cannot raise the question that the interest and penalty was collected without authority of law. 27 Am. & Eng. Enc. Law, 801, 802; *Battles v. Doll*, 113 Wis. 357, 89 N. W. 187; *Berrien County Treasurer v. Bunbury*, 45 Mich. 79, 7 N. W. 704; *Pawlet v. Kelley*, 69 Vt. 398, 38 Atl. 92; *Street Lighting Dist. No. 1 v. Drummond*, 63 N. J. L. 493, 43 Atl. 1061; *People ex rel. Love v. Austin*, 46 Cal. 520; *Kuntz v. Cedarville*, 109 Ill. App. 330.

Goss, J. This is a proceeding in mandamus to compel the county treasurer of Richland county to credit a collection made by him of interest and penalty collected to the particular drain fund for which such interest and penalty and special assessment was paid. Viking township, the relator, was assessed \$2,641 for special benefits received by highways within its limits from the construction of Viking drain No. 14. Upon payment thereof after delinquency, it also paid in addition thereto the sum of \$185 as interest and penalty upon such special assessment, which sum was so received by the county treasurer of Richland county. The total payment was then divided, and said offi-

cial, acting under the orders of the county commissioners, credited said \$185 to a so-called county courthouse fund belonging to the county, instead of its being credited to and placed as a part of the drain fund of Viking drain. Relator seeks to compel the county treasurer to credit, as a part of said drain fund, this amount so collected as interest and penalty. From an order of the lower court so directing, the county treasurer appeals.

On the merits, appellant's contentions are summarized by him to be: "First, that there was no law authorizing the collection of either interest or penalty at the time of this collection, it being prior to the enactment of chap. 125 of the Session Laws of 1911; and, second, that under the law this interest and penalty collected belonged to the county." To the first of these propositions we unqualifiedly agree. We have held in *Hackney v. Elliott*, 23 N. D. 373, 137 N. W. 433, that on special assessments levied for drainage purposes prior to the 1911 statute, no interest and penalty can legally be collected. Until the enactment of the 1911 statute, no authority existed for the collection of interest and penalty upon drainage assessments. We may here remark that cities have always had statutory authority for the collection of interest and penalty on special assessments for city purposes, so this holding concerning interest and penalty on drain assessments is not to be understood as applying to the collection of special assessments for cities. *Rev. Codes 1905, Sec. 2807; Fargo v. Ross*, 11 N. D. 369, 92 N. W. 449; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357; *Red River Valley Nat. Bank v. Fargo*, 14 N. D. 88, 103 N. W. 390.

The question then is, Conceding that the amount so paid for and as interest and penalty on delinquent special assessments could not have been collected if it had not been voluntarily paid for such purposes, does it belong to the county or to the said drain fund? The statute, § 1832, *Rev. Codes 1905*, as amended by the Session Laws of 1907, at page 127, concerning the collection of drainage assessments, provides: "The drain taxes shall be collected by the county treasurer, and all moneys so collected shall be credited to the drain fund to which they belong, and the county treasurer shall be the treasurer of such drain funds." The excess part of this special assessment collection then was so collected by the treasurer of this drain fund, the county treasurer.

by statute being *ex officio* collector of said fund. Had the collection of interest and penalty been authorized by statute, then by virtue thereof it should "be credited to the drain fund" to which it belonged. And unless some statute operates to transfer the right to such excess collected as interest and penalty to the county, it must on general principles follow the special assessment (37 Cyc. 1594); and under this statute directing the credit of "all moneys so collected" it must be regarded as a part of the fund for which it was paid and collected. Besides, a further reason exists, being that the taxpayer, relator, still has a right concerning the application of the money paid, it having been voluntarily paid and received as trust funds to be applied to the payment of the expenses of the drainage construction, to the extent at least to which the township property may have been heretofore, or may have to be hereafter, assessed to fully meet such cost of drain construction. As is stated in *Red River Valley Nat. Bank v. Fargo*, 14 N. D. 88, on page, 93, 103 N. W. 390, concerning city assessments analogous to drainage assessments: "Every dollar thereafter coming into that fund up to the amount required to redeem each of these warrants became impressed with a trust in favor of the holder of each warrant, and the city was the trustee." In this case the county undoubtedly is the trustee. A diversion by a city of moneys collected by it to meet special assessment paving warrants is a "violation of a trust, rendering the city liable." *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, at page 377, 96 N. W. 357, and abundant authority there cited. "If overpayments upon the assessments have been made, the party who has made such overpayments is entitled to have them applied to the payment of instalments to become due in the future." Page & J. *Taxation by Assessment*, § 1094, citing *Fall Creek & W. Twp. G. R. Co. v. Wallace*, 39 Ind. 435; *Re Rust*, 24 Hun, 229; *Cincinnati v. James*, 55 Ohio St. 180, 44 N. E. 925; and *Cincinnati v. Manss*, 54 Ohio St. 257, 43 N. E. 687. We think the law is settled that a special assessment collection cannot be diverted to other uses.

But appellants contend that § 1575, Rev. Codes 1905, operates to transfer the right to this penalty and interest collection to the county. The statute reads: "All penalty and interest collected on taxes shall belong to the county and become a part of the general fund, or such other fund as the county commissioners may direct; except the penalty

and interest collected on special assessments due to cities, and all such penalties and interest shall be paid to the city thereunto entitled." We have held in *Hackney v. Elliott*, *supra*, that this and other statutes concerning taxes do not apply to special assessments for drainage purposes, and that interest and penalty on drain assessments as heretofore stated cannot be legally collected. If the law does not contemplate or authorize the collection of interest and penalty on drain assessments, most certainly § 1575 of the Code cannot authorize or be construed as directing that such interest and penalty collected without authority of law shall belong to the county and become a part of the general fund, or be subject to the control of the county commissioners. This statutory provision has reference only to taxes, and has no application to special assessments or any payments made as a part of special assessments or collected under color of special assessment provisions. *Jones & P. Taxation by Assessment*, § 475, and § 1575 was not repealed by chap. 93, Sess. Laws, 1907. This collection is no part of a tax, but rather is part of a special assessment and is left in the fund into which it was voluntarily paid and in which relator is still interested in its application.

But there is another all-sufficient reason why the appellant, the county treasurer, should not prevail. Appellant cannot be heard to urge any irregularity or illegality in this collection as against the respondent so interested in the Viking township drain fund. Acting as the treasurer of such drain fund, the county treasurer has collected this \$185 as interest and penalty and as a part of a total collection made for this particular drain fund of which he is, by virtue of his office, custodian, with the county also a trustee for the fund. He should not be heard to question the legality of his own act in collecting the same. It must, so far as distribution of public funds is concerned, be regarded as drain funds voluntarily paid and legally collected for such purpose. The county having no interest therein, the only duty of its officer and the treasurer of this fund is to credit the amount thereof to this drain fund, and "it is wholly immaterial that the tax collected by him may have been unconstitutional or otherwise illegal and void; or that it was improperly collected as under the authority of a defective assessment or warrant or even without any warrant at all. . . . He cannot impeach his own acts, or question the right of the state or other political

division at whose instance the tax was collected to receive the same. Having accepted the money as collected, he is estopped from denying the validity of the tax. Though the taxpayer might properly refuse to pay the tax, and though the collector might be justified in refusing to collect it, if the tax is actually paid into the collector's hands the trust attaches and the right of the taxing authorities to insist upon payment over is perfect." 27 Am. & Eng. Enc. Law, 801, 802. "Such a suit [against a collector for public moneys collected as taxes] the collector can defend only on such grounds as would constitute a defense to a like suit as between other parties who stand in the relation of principal and agent. It would be a suit for money received by the collector for the use of the public; and he would not be permitted to rely on technical objections which might be made to the right of the public to the money. If he receives the money to the use of the public, he should account for it. And it is immaterial that those who have paid it might successfully have resisted the collection from them." 2 Cooley, Taxn. 1324. And by statute it is for this collection as a part of a drain fund that he must account. "It is the duty of a tax collector to pay over the money actually received by him in the form of taxes, notwithstanding the tax may be illegal or there may be defects in the levy, assessment, or tax warrant. And this he must do punctually at the time or times required by law." 37 Cyc. 1206. And such is already the declared law of this state. *Red River Valley Nat. Bank v. Fargo*, 14 N. D. 88, 103 N. W. 390, from page 94, of which we quote: "The money paid for these special assessments was paid to and received by the city for the sole purpose of paying for this paving. It is too clear for argument that the city cannot be heard to say that it is under no obligation to pay the money so received to those for whose benefit it was paid, because those who paid it could not have been compelled to do so." This applies equally to the county and its officer, appellant. There is no distinction in principle between the defense urged by the city against the payment of the paving warrants, to meet which special assessments were levied and paid as in that case, from the defense here urged by appellant. His plain duty is that "all moneys so collected shall be credited to the drain fund to which they belong;" and he, as "the treasurer of such drain fund," is the party directed by statute to make such credit, and that without questioning the right of the drain dis-

trict to make the collection ; he, having made the collection and received the money as a part of said fund, must credit it to that fund. And, as heretofore stated, the county having no right to the money so collected for such purposes, the provisions of § 1575 not applying, the county commissioners are without authority to order a credit of said moneys to be made to another fund in disregard of § 1832, as amended by the Session Laws of 1907, above quoted.

We should state here that the 7 per cent interest exacted in *Hackney v. Elliott*, 23 N. D. 373, 137 N. W. 433, was under the principle of compelling equity of one seeking equity. The county had there sold the assessed property at a tax sale and received the purchaser's money thereon. The sale being adjudged illegal for reasons stated, the county was obliged by statute (§ 1705, Rev. Codes 1905) to reimburse the purchaser with 7 per cent interest from date of sale. Hence, before granting relief from such sale, such repayment with interest should be compelled. But in the absence of a sale, or prior to a sale, no interest can be collected on special drain assessments prior to collections made under the 1911 statute explicitly giving such right.

The appellant has attempted to urge that Richland county is a proper and necessary party to this proceeding, and that because of the nonjoinder of the county therein there is such a defect of parties as will preclude a judgment on the merits involved. We note that issue was joined by answer to the affidavit and alternative writ after a demurrer had been interposed and sustained and amendments thereafter made to the affidavit and writ, and that the defendant has not demurred because of a defect of parties defendant. And he has answered and joined issue on the merits and thereafter tried such issues. He has therefore waived any defect in parties defendant, granting there may have been such a defect. Sections 6854 & 6858, Rev. Codes 1905 ; *Ross v. Paige*, 11 N. D. 458, 92 N. W. 822 ; *Olson v. Shirley*, 12 N. D. 106, 96 N. W. 297 ; *Van Gordon v. Goldamer*, 16 N. D. 323, 113 N. W. 609, at page 331.

If authority for the remedy of mandamus is necessary, see 26 Cyc. 334: "Upon the collection of taxes, mandamus will lie to compel a proper apportionment or division thereof among the municipalities and officers lawfully entitled thereto." Such only is the relief here sought, in effect a tax apportionment to a particular fund to the credit

of the lesser municipality for which the county, through its treasurer, acts as the collecting municipality. "Since mandamus lies to compel the performance of a clear legal and nondiscretionary duty, if the public corporation or officer which is bound to perform such duty refuses or neglects so to do, it follows that where the facts are conceded or established, which show the existence of the legal duty, the absence of the power of exercising a discretion in the matter and the failure or omission of the corporation or officer thereof to perform the duty, mandamus will lie;" citing instances of its exercise. Page & J. Taxation by Assessment, § 1469. The duty is here plain, the act nondiscretionary, the facts not in controversy, the refusal conceded but sought to be justified by an erroneous construction of law, the right of relator to recover the tax doubtful and waived with no adequate, specific relief; mandamus as relief is ample, full, adequate, speedy, and the relief necessary. It is the proper remedy.

As to the extent of the relief to which relator is entitled, the writ properly covered all payments similar to that made by relator, which were paid as a part of, or as interest and penalty upon, special assessments to create the drainage fund for Viking Drain No. 14. "The right of a taxpayer to institute an action to enjoin municipal officers from unlawfully dissipating public funds is a right common to all taxpayers, great and small." Engstad v. Dinnie, 8 N. D. 1, page 12, 76 N. W. 292. This relator township has an interest analogous to that of a taxpayer in the application of all assessments levied to meet the construction of said Viking drain. The township's interest in real property, like all in said drainage district, is, or may be, subject to reassessment for any deficiency not met by the collection of the assessment made. Therefore, like any ordinary landowner in said drainage district subject to assessment, relator township is entitled to have all funds so collected as penalty and interest, by whomsoever paid, and belonging to said Viking drain fund, and unlawfully diverted therefrom to Richland county, ascertained in amount and retransferred into said drain fund. It was proper for the judgment to so direct.

Judgment for the issuance of a peremptory writ of mandamus is ordered affirmed, with costs.

MURPHY v. MINOT FOUNDRY & MACHINE CO.

(139 N. W. 518.)

Default judgment — laches in seeking relief.

From an order refusing to vacate a judgment entered on default, defendant appeals. *Held*, that the entering of the order under the facts as disclosed by the affidavits and files was not an abuse of discretion, it appearing that defendant was guilty of laches in not moving to vacate said judgment for nearly eight months after knowledge of its entry.

Opinion filed December 21, 1912

Appeal by defendant from an order of the County Court of Increased Jurisdiction of Ward County, *N. Davis, J.*, refusing to vacate a judgment entered on default in an action brought to recover wages alleged to be due.

Affirmed.

Arthur Le Sueur and Noble, Blood, & Adamson, for appellant.

Until there had first been a ruling by the court on the motion of defendant adverse to it, no judgment by default for failure to answer could properly be entered. *Smalley v. Lasell*, 26 S. D. 239, 128 N. W. 142.

F. B. Lambert, for respondent.

Not necessary to have formal findings when the defendant does not appear, and the judgment may be entered by direct order of the court without such findings and conclusions. *Cole v. Custer County Agri. Mineral & Stock Asso.* 3 S. D. 272, 52 N. W. 1086; *Black Hills Nat. Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071.

Second application to open up a judgment barred by a denial to open up contained in an order made on the first application. 1 *Van Fleet, Former Adjudication*, 101; *Kabe v. The Eagle*, 25 Wis. 108.

Such orders should not be disregarded when the same question is raised in the same action. *Dawson v. Parsons*, 16 Misc. 190, 38 N. Y. Supp. 1000.

Person allowed to appear and be heard in the argument of a motion is concluded by the courts' disposition of it. *National Park Bank v. Whitmore*, 7 N. Y. S. R. 456.

Orders made on motions affecting substantial rights, from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issues necessarily decided as are final judgments. *Halvorsen v. Orinoco Min. Co.* 89 Minn. 470, 95 N. W. 320; *Fitterling v. Welch*, 76 Minn. 441, 79 N. W. 500; *Truesdale v. Farmers' Loan & T. Co.* 67 Minn. 454, 64 Am. St. Rep. 430, 70 N. W. 568; *Tracy v. Falvey*, 102 App. Div. 585, 92 N. Y. Supp. 625; *Re Randall*, 87 App. Div. 245, 84 N. Y. Supp. 294; *Oppenheim v. Lewis*, 20 App. Div. 332, 46 N. Y. Supp. 765.

In application for relief trial courts are vested with large discretion, and their action will not be disturbed unless such discretion has been abused. *Keeney v. Fargo*, 14 N. D. 419, 105 N. W. 92; *McAndrews v. Security State Bank*, 25 S. D. 590, 127 N. W. 536.

The application must be made with promptness. *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; *Cline v. Duffey*, 20 N. D. 525, 129 N. W. 75.

Goss, J. This appeal involves the propriety of an order of the lower court refusing to vacate a default judgment on the application therefor of this appellant. This action was begun by the personal service of a summons and complaint on October 5, 1910, upon one Grow, as director of the defendant corporation. Five days thereafter, on October 10, 1910, there was served upon the attorney for plaintiff an instrument designated "motion to dismiss," entitled in the action, the body of which motion reads:

Comes now C. A. Grow, the person upon whom the complaint was served in the foregoing entitled matter, and appears specially, and objects to the jurisdiction of the above entitled court on the ground and for the reason that there is no such corporation as "Minot Foundry & Machine Company," the said corporation having long since ceased to exist as such, and therefore moves the dismissal of the above entitled action, and for judgment for costs, for want of jurisdiction. Dated October 10, 1910.

Signed, Arthur LeSueur,
Attorney for C. A. Grow, Minot, N. D.

This instrument was not filed in county court until June 27, 1911, as a part of the application to vacate, and consequently was never brought on for hearing or passed upon by said court. On October 31, 1910, and some fifteen days after defendant was in default in answer or demurrer, plaintiff's attorney filed with the court a sheriff's return of personal service of summons and complaint and an affidavit of default stating that defendant had not "answered said complaint, nor has it appeared in any way in said action." Thereupon judgment by default was ordered and forthwith entered. And this judgment is the one here involved, and that the trial court subsequently refused to vacate, from which order the appeal is prosecuted. Reciting matters in chronological order, plaintiff next sought collection of this judgment by execution, which, on November 23, 1910, was returned by the sheriff wholly unsatisfied. Plaintiff, then, using the judgment as a basis for personal claim against the stockholders and officers of the defendant corporation, next began a district court action against each and all of the officers, directors, and stockholders of the defendant company, seeking to establish personal liability against each for the amount of the judgment in county court. Personal service of summons and complaint in this district court action was had on November 30, and December 3, 1910, upon all of such officers, directors, and stockholders, some eleven in number. To this complaint such defendants demurred, and their demurrer was overruled in district court on February 24, 1911. Then, on March 2, 1911, a motion to vacate the default judgment in county court, coupled with a motion for dismissal thereof after vacation, was made. This motion was entitled in the county court with parties the same as was the action in which the judgment was obtained, and was directed to the attorney for this plaintiff. It reads:

Take notice that the undersigned will, on Tuesday, the 7th day of March, 1911, move the above entitled court to vacate the judgment entered in the above entitled action, on the ground and for the reason that the same was obtained by fraud, the affidavit of default being false in fact; and will also bring on for hearing at said time, viz., 2 o'clock of said day, or at such later time as counsel can be heard, the

motion to dismiss the action in which said judgment was entered heretofore in the above entitled action.

Dated February 24, 1911.

Signed, Arthur Le Sueur,
Attorney for C. A. Grow.

This motion to vacate, like the former so-called "motion to dismiss," was not made by the defendant corporation, but by an individual. No affidavit of merit, or proposed answer accompanied the application. Hearing was had thereon, at which the attorney for plaintiff filed his affidavit calling attention to the fact that the application to vacate was not made by the defendant company. His affidavit recites:

"That the defendant in said action has never, to this date, appeared therein or served any papers, or caused any to be served, of any kind, nature, or description, on this affiant; nor has the said defendant ever filed any answer, demurrer, or appearance whatever with the clerk of said court up to or at the time said judgment was entered; that Grow, who now appears to be attempting to set aside such judgment, was not a party to said action, and so far as the record discloses was not interested in the same so as to be bound thereby in any personal way. That both said Grow and Arthur Le Sueur, his attorney, well knew said action was pending long before said judgment was entered, and had said corporation had any defense to the complaint in said action, it could have put in an answer within the statutory time."

The affidavit then recites the proceedings had, issuance of an execution out of the county court, and its return unsatisfied. That affiant talked with both Grow and Le Sueur personally about the execution, and that they were both informed that the claim was then in judgment in November, 1910. The suit in district court then pending, brought to establish personal liability against the directors and stockholders, and the progress of said suit, were set forth by affidavit, and that by said district court action Grow and Le Sueur, his attorney, "had elected to appear in the second action above named, and use the same as a remedy for the relief asked in the case at bar," in county court. This application to vacate was denied by order dated March 11th, personal service of which order was accepted in writing by Le Sueur, as attorney for Grow, on said date.

More than three months then elapsed with no further steps taken to obtain relief from this default judgment. Then, on June 17, 1911, new attorneys appeared, those who are now of counsel in this case on appeal, and for the first time an application was made by the defendant corporation for a vacation of the default judgment, with hearing noticed for June 26, 1911, accompanied by a proposed answer, verified by Grow as stockholder and former president of the defendant company, supported by affidavits of merit made by Grow and other officers, by one of counsel, and by Arthur Le Sueur. The motion to vacate recites that it is made upon the affidavit of these parties, "together with the appearance entered in said action by Arthur Le Sueur and the motion to dismiss served upon plaintiff in said action on the 10th day of October, 1910, together with his admitted service thereon, and all of the files and records in said action." The answer accompanying the application "admits that the defendant was a corporation at the time that plaintiff claims he performed the labor for the defendant as set out in his complaint, but denies that it existed at the time of the bringing of this action or at any time since." Hearing was had upon said motion, at which the attorney for plaintiff, by affidavit filed, recited the various steps taken in the cause, the pendency of the district court action against the stockholders, of various conversations had with such stockholders, that certain of them named had informed him, "after being informed of the entry of judgment, that the whole matter was left in Arthur Le Sueur's hands, and whatever he said was all right and would be abided by by the balance of the stockholders; that this affiant again went to Arthur Le Sueur and received the information that plaintiff could 'go jump in the lake, as he would never get a damn cent, and if the plaintiff, or this affiant, knew where they could get the money, simply hop to it.'" That thereafter the action in district court against the stockholders to establish their personal liability was begun. "That this affiant had had repeated talks with the defendant stockholders of said corporation and the defendant directors; that he has been informed by each one of them with whom he has talked that said corporation was the owner of a \$1,000 note (signed by parties named in the affidavit), either one of which persons are financially responsible for more than five times the amount of said note." That certain officers and stockholders have refused to disclo-

the whereabouts of said note, and have concealed the assets of the defendant corporation from levy on execution herein. Then follow allegations of admissions of liability on the part of the defendant to the plaintiff, made by several of the stockholders, and oral offer to settle, and an allegation on information and belief that this motion to vacate is not made with the consent of the majority of the stockholders, but for the purpose of delay and harassing the plaintiff. That a stockholder named, "on Saturday, the 24th of June, 1911, stated that they would fight this matter to the supreme court and as far as they possibly could, and they could assure the plaintiff that he would make nothing out of the deal if he won, and they were willing to lose all they had in the deal and put in as much more;" and the good faith of the moving parties is challenged by another paragraph to the effect "that the judgment in this action was not taken by the plaintiff against the defendant through mistake, inadvertence, surprise, or excusable neglect," but "the parties interested have had full knowledge of the same for more than eight months last past, during which time they have slept on their rights and have attempted to fight the case in other courts, and only have resorted to this court soon after having been defeated there." "That there has been no oversight in this matter by the defendants or its officers, but that the whole matter has been continually before said corporation, its board of directors, and individual stockholders for some eight or nine months past, and that this motion is being made as a last effort to defeat the plaintiff in his just seeking for his own due." On the question of the corporate existence of defendant, two letters from the secretary of state, dated October 21, 1910, and November 5, 1910, accompany the affidavit, showing the corporate existence of the defendant company and the noncancellation of their charter at the latter date, which was after the entry of this default judgment sought to be vacated.

Three counter affidavits on the hearing were filed by the defendant company. They were made by some of the officers named in the affidavit, above recited, of plaintiff's attorney. One of said affidavits is by a stockholder not named as defendant in the district court proceeding, and he alleges ignorance of the entry of judgment, or the pendency of the action in county court until about the 1st of June, 1911. One of the others admits knowledge of the entry of judgment since the

service upon him of summons in the district court action against the stockholders, and the other counter affidavit is indefinite as to the time when knowledge was received of the pendency or entry of judgment in the country court action. But it is significant that none of the stockholders deny the statements attributed to them by the affidavit of attorney for plaintiff, tending to charge them with litigation for the purposes of delay. One of these stockholders has filed a counter affidavit without mentioning or denying the statement made in plaintiff's affidavit that the case would be appealed to the supreme court, and, in substance, that the collection of the debt would be deferred as long as possible, although a denial is made by this stockholder as to any admission of liability by the defendant corporation to plaintiff on the debts sued upon; nor does attorney Le Sueur in any way deny the charge that the settlement of this matter was left to him, and his statements as to what plaintiff could do if he knew where he could get the money; nor is there any denial of the statement in the affidavit filed by the plaintiff's attorney charging the officers of said corporation with secreting the property belonging to the said corporation and the sale of the assets of the corporation, and that the corporation has a \$1,000 note signed by two responsible parties, more than sufficient to pay the judgment claim.

Upon the showing made the county court denied the application to vacate, and defendant appeals to this court from said order. The error assigned in the brief is (1) "Error in denying defendant's motion to open up the judgment, and for leave to interpose its defense to plaintiff's action. (2) Error in entering an order, for judgment in plaintiff's favor in the absence of evidence to support the allegations of said complaint. (3) Error in denying defendant's motion, for the reason that plaintiff, at the time he moved the court for judgment by default, was not entitled thereto, the affidavit of default reciting 'that defendant had not appeared in the action in any way' being false. the special appearance and the motion to dismiss showing, upon its face, that it was made in defendant's behalf, and this appearance and motion were interposed within five days after the service of the summons and complaint. (4) That it was an abuse of discretion to deny defendant's motion in the face of the showing made, such showing, considering all affidavits of merit and verified answer, stating a meritorious

defense, and numerous affidavits going to the question of defendant's good faith."

The first and fourth assignments are identical, except that the fourth is more explicit than the first. The second and third are related and depend in part upon the construction to be given to the so-called motion to dismiss, made five days after the service of the summons. We will first discuss the third assignment, which is based upon the regularity of the entry of judgment with the so-called motion to dismiss charged to have been pending and undisposed of.

A reference to this instrument, entitled "Motion to Dismiss," discloses that it is a nullity. It is a mere notice. It was not filed in court, and was never brought on for hearing. Nor was it the act of defendant, but that by a third party made under the supposition that the defendant company had ceased to exist, and therefore that the defendant company as a corporate entity could not appear. This appears from the instrument itself, from the alleged grounds upon which it is made, that "the said corporation having long since ceased to exist as such" consequently could not make an appearance; and above all, the instrument does not purport to be a general appearance, but recites that this third party "appears specially and objects to the jurisdiction of the above entitled court," which did not assert jurisdiction over the person of this third party. Plainly no issue of law or fact was raised. No warrant of law existed for the filing of this anomalous instrument, nor for the court to have considered it, had it been called to its attention. Plaintiff's attorney rightfully ignored it as did the court on the application to vacate, made by this third party in March, on a similar attempt to litigate issues without appearing in the action; in which proceeding the party and the attorney were attempting to accomplish something without incurring the liability of making an appearance. Plaintiff's attorney, by affidavit then filed, called attention to the fact that no appearance had been made by the corporation, after which no attempt, even then, was made to enter an appearance for, or do any act on behalf of, the corporation. The president of the corporation and Le Sueur, his attorney, were evidently laboring under the belief that no valid judgment could be taken against the corporation, and that all that was necessary was that a third party should appear, move to dismiss the action, and recover

judgment for costs against the plaintiff. But if, on the contrary, he understood what he was then doing, and that the so-called special appearance must be held as void because not purporting to have been made on behalf of the corporation, with the record disclosing, as it does, that he was an officer and stockholder of this corporation, his good faith on the application made later is thoroughly impeached, notwithstanding his own affidavit, with the result that the affidavit of the plaintiff charging defendant with litigating for purposes of delay only is thus corroborated. Otherwise, why did this attorney not, if defendant had a defense, appear and interpose it by answer within time, instead of filing instruments amounting to nullities and adopting the anomalous procedure that he did, to secure something to which he must have known defendant was not entitled,—a dismissal of the action, and with even judgment for costs demanded?

In justice to present counsel in the case, we would say that on the argument of this appeal Attorney Blood has not been insistent upon these assignments under discussion, though not abandoning them, and on argument took the position that if the court found this so-called appearance not to have been such, the proceedings in March would not be *res judicata* to the application to vacate made in June; and that such application last made should then be treated as the first appearance made in this case. The so-called motion to dismiss, served October 10, 1910, was no appearance, and it follows that it in no wise interfered with the entry of judgment by default, which could be done, under § 7001, Rev. Codes 1905, without the assessment of damages, the action being on contract for the recovery of money only, and the complaint standing confessed by defendant's default in appearance. The judgment was therefore regularly entered.

This brings us to the fourth assignment, embodying also the first assignment of error, and whether the trial court abused its discretion under the record in denying the application to vacate by its order of July 20, 1911, appealed from. This question involves the sufficiency of the affidavit of merit and proposed answer as disclosing a *prima facie* defense, and whether such defense, though *prima facie* sufficient to defeat plaintiff's recovery, should be permitted to be interposed, and involves the review of the exercise of the discretion of the trial court. On the question of whether the defense may be interposed or

not, its interposition is a matter in the discretion of the trial court, instead of a matter of strict legal right. In the granting of the right to defend arises the question of whether defendant corporation has been guilty of laches, and where the application made is in good faith, as to which, concerning both questions, the court may consider any excuses offered for delay in applying for relief from the judgment. Upon these questions we find no excuses are offered, nor can any be offered, for the delay of over seven months intervening from the 31st of October, 1910, the date of the entry of judgment, and the 17th of June, 1911, the date of the notice to vacate said judgment. The record, as heretofore recited, discloses that Grow was personally served as a director of the corporation, on October 5, 1910. Under his own affidavit he was the president of the corporation. Manifestly he must have employed Attorney Le Sueur, also a stockholder and officer of the corporation, in the matter of the defense, and this promptly, as the attempt to make a special appearance in the proceedings within five days after the service of the summons indicates. Then again, these two officers, and nine other directors and stockholders, of the corporation, were personally served on or before December 3, 1910, with a summons and complaint in the district court action to establish liability as stockholders against them, based on the entry of this judgment in county court, and this after execution had been issued and assets sought to be discovered by the sheriff to satisfy the county court judgment. It would seem to be conclusive that actual notice must have been promptly brought home to the officials of defendant corporation that this claim was in judgment. Indeed, the affidavits of the defendant company stockholders and officers, filed in the case, by their failure to deny the plain and emphatic statements and steps rehearsed as taken by plaintiff, as set forth in the affidavit of his attorney, must be taken as admitting knowledge of the entry of judgment. The possession of assets of the defendant corporation, their concealment or failure to disclose the same for levy on the execution issued on this judgment in November, 1910, is inconsistent with its claim of good faith. In fact, the record discloses facts and circumstances which raise the strong probability that the failure to interpose an answer or defense in county court may have been because those in charge of the matter concerning this claim then probably concluded that the collection of

the claim could be defeated in any event by concealment of the company's assets in commercial paper; and it was not until a realization of personal liability, awakened by the progress of the district court suit against the stockholders, that an idea of setting aside the default judgment began to be seriously considered. It is probable that with this mistaken idea of the nonliability of the stockholders arose also the belief that, because the charter of the company was subject to cancellation for noncompliance with the law regarding a report and payment of a fee to the secretary of state, the officers had assumed that a cancellation of the charter had taken place, and that the company was not in existence, even for the purposes of suit. Here, again, may have been overlooked the provisions of § 4262, Rev. Codes 1905, to the contrary, providing explicitly: "Nor does the dissolution of any such corporation take away or impair any remedy given against such corporation, its stockholders, or officers, for any liability which has been previously incurred." And in this connection we call attention, as heretofore, that the proposed answer accompanying the application to vacate admits the corporate existence of the company at the time the work was performed, and presumably when the liability to pay therefor arose. Accordingly, we may leave out of consideration the fact that appellant on this appeal has changed position from that urged below as a reason for a vacation of the judgment, where, if we may judge from the motion filed, he there urged error predicated upon the alleged appearance by Le Sueur; and especially the proceedings had on the 10th of October, 1910, termed in said motion an appearance entered in the action; but which proposition is, an oral argument on appeal, abandoned to avoid the effect of a similar appearance in March being construed as *res judicata* to the application here urged. We have ignored this change of position, and passed upon the matter as though no such questions were involved. We find that defendant corporation and its officials, acting in its behalf, have been guilty of laches, consisting of wholly unexcused delay in making application to be relieved from such default judgment. We further find sufficient evidence of a want of good faith in the proceedings taken between the date of the default judgment and the date of the motion for this vacation of judgment, to alone have warranted the trial court in denying relief. If authorities for our findings and position are desired, the same will be found col-

lected in the citation of authority in *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, and the recent case of *Wannemacher v. Vance*, 23 N. D. 634, 138 N. W. 3.

We have not considered the question urged by respondent of an election of remedies, to the effect that, because the stockholders for defendant in the district court suit, during the time when the defendant corporation should have sought relief by a vacation of judgment in the county court, elected to litigate liability in the district court suit, they have waived any right to attack the county court judgment. On this question we do not pass, as it is unnecessary to a decision of the case. We may here add that we have not considered the district court case against the stockholders, except as it may disclose reasons for delay in moving to vacate the county court judgment, or as bearing upon the good faith of the parties in the county court proceedings.

We conclude that no abuse of discretion on the part of the trial court in the denial of the application to vacate this judgment has been shown, and the order appealed from is accordingly ordered affirmed, with respondent's costs and disbursements on this appeal assessed against appellant.

STATE EX REL CITY OF FARGO v. MITCHELL, Treasurer,
and HILDRETH, Intervener.

(139 N. W. 572.)

Mandamus — issuance of bonds — defense — illegal application of proceeds.

1. In a mandamus proceeding which is brought to compel a city treasurer to make the certificate required by § 2577, Rev. Codes, 1905, that bonds are legally issued and are within the debt limit of a city, an issue or defense is not pertinent or germane which is based upon the alleged illegality of a contract in payment of which the proceeds of said bonds may afterwards be applied.

Mandamus — intervention — right of intervention — time.

2. Under § 6825, Rev. Codes 1905, which provides that "any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both, . . . filed by leave of the court," etc., it is not an abuse of dis-

cretion on the part of the trial court to refuse leave to intervene in a mandamus proceeding, after a general demurrer has been interposed to the answer in the case and argued by counsel, even though a decision has not been rendered thereon. Especially is this the case where the intervener has himself appeared as counsel for the principal defendant, and has been perfectly aware of all of the defenses which were made and intended to be made in the proceeding.

Opinion filed December 23, 1912.

Appeal by intervener from an order of the District Court for Cass County, *Pollock, J.*, denying the right to intervene in mandamus proceedings to compel the principal defendant to certify the legality, etc., of the city bonds, as the treasurer of such city.

Affirmed.

Statement by BRUCE, J.

On July 6th, 1910, an election was held in the city of Fargo, submitting to the voters the question of the issue of city bonds for the construction of a pumping station and filtration plant, and necessary machinery and connections. The question submitted to the people was in the following form: "Shall the city of Fargo issue bonds in the sum of sixty-five thousand dollars (\$65,000), bearing interest at the rate of 5 per cent per annum, for the purpose of paying the cost of machinery and materials for and the construction of a waterworks station and filtration plant, and making the necessary connections with the present existing water mains and water plant, and installing therein all necessary pumps, machinery, appliances, and apparatus for the erecting of the same, said plant and machinery to be used for the purpose of furnishing to the inhabitants of the city of Fargo a pure water supply, and for the purpose of fire protection for said city?" This proposition was carried and answered in the affirmative by a vote of 649 to 78. Bids were then called for by the city for the purchase of said issue of bonds, and on the 10th day of July, 1911, the city council accepted the proposal of the Minnesota Loan & Trust Company for the purchase of said bonds, and thereafter the mayor and city auditor of said city duly executed the same. Printed as an indorsement upon the bonds, however, and as required by law, was a certificate stating

in substance that said bonds were issued pursuant to law, and were within the debt limit of the city of Fargo. On the 5th day of November, 1911, this certificate was presented to Chas. H. Mitchell, the defendant and respondent herein, as treasurer of the city of Fargo, for his signature, it being necessary to have the signature of the city treasurer in order to make the bonds negotiable. Mitchell refused to sign the certificate without an order of the court, and an alternative writ of mandamus was obtained by the city of Fargo, requiring the said Mitchell to show cause why a peremptory writ should not be issued to compel him to sign the said certificate. In these proceedings the city treasurer filed an answer which alleged that there was pending in the district court of the county of Cass an action wherein one W. J. Price, a citizen and taxpayer of said city of Fargo, sought to restrain the officers of said city from carrying out the terms of a contract entered into by the said city with one James Kennedy for the construction of the filtration plant referred to, and that said action had not yet been determined, and alleging that in said action the validity of the said contract was attacked, and that the respondent verily believed that the issue of the bonds was illegal and void. The answer, however, specifically stated that the refusal of the treasurer to execute said bonds was "based upon the facts heretofore set forth, upon the pendency of said action testing the validity of said *contract*." A demurrer was interposed by the city to this answer, and after argument the demurrer was sustained. In these proceedings, and in the argument on the demurrer, M. A. Hildreth, the intervener and appellant herein, appeared as counsel for the city treasurer. From the order sustaining this demurrer the respondent treasurer took and authorized no appeal. Thereupon, after the argument on the demurrer, but before a decision thereon, and again on the 9th day of September, 1911, M. A. Hildreth, for and on behalf of himself as a citizen and taxpayer and resident of the city of Fargo, prayed leave to intervene in the above entitled action, and to file an answer in the same, a copy of which answer was attached to the said petition. In this petition, and as a ground for his request for leave to intervene, said M. A. Hildreth alleged that "he was instructed to prepare, and did prepare, by the defendant in the above entitled action (the city treasurer), an answer which attacked the validity of certain reputed bonds amounting to \$65,000, about to

be issued by the city of Fargo; that said answer was prepared on Thursday, the 7th day of September, 1911; that he was instructed and did prepare said answer after a full and complete consultation with Mr. Mitchell (the city treasurer), in which said Mitchell agreed with your petitioner that the entire proceedings relating to the issue of said bonds was void; that afterwards, for reasons unbeknown to your petitioner, the said Mitchell refused to sign said answer, and instructed your petitioner, as his counsel, to draw an answer setting up, *and only setting up, the pendency of an action by W. J. Price against the city of Fargo and others*; that your petitioner repeatedly called Mr. Mitchell's attention to the fact that *the validity of said bonds was not attacked in said answer, and said Mitchell has refused to attack the validity of said bonds*, and that the proceeds thereof are to be used in the payment of a contract with one James Kennedy, which, as your petitioner avers, is absolutely void. Your petitioner says that, in behalf of the citizens and taxpayers of Fargo, of whom he is one, he, considering the question of so great importance in connection with the issue of said \$65,000 worth of bonds to be used in payment of said illegal contract, referred to in Exhibit A, with said James Kennedy, and that said Mitchell would pay out the proceeds of said bonds if not prevented by this court, to the said James Kennedy under said contract, he prays this honorable court to be permitted to intervene in the above entitled cause, and file an answer hereto annexed as an answer in intervention." The answer attached to said petition for intervention contained no allegation whatsoever which in any way questioned the validity of the election in which the issue of the bonds was authorized by the electorate of the city of Fargo except in so far as the excess over the debt limit was concerned nor did it in any particular question the validity of the contract for the sale of said bonds to the Minnesota Loan & Trust Company. It merely alleged and charged "the fact to be as indicating the illegality of all the proceedings with reference to the issue of said bonds hereinafter to be referred to in this answer, that in violation of the law, on the 18th day of April, 1911, the said common council illegally passed a resolution extending the time for receiving bids for the filtration plant, well house, and pumping station, boilers, engines, etc., and that no sufficient notice of such extension was given to the bidders. It further alleged that the city

illegally employed one Burdick as an assistant engineer to aid said council in determining which was the lowest and best bid, and that later another illegal resolution was adopted which referred said bids to the city engineer with said assistant engineer, and to the members of the fire and water commission, to examine and report on the merits and value of the respective bids. It further alleged that on such report the council illegally and improperly purported to submit the report and determination of said bids, and then and there the common council of the city of Fargo, by resolution, illegally and improperly made and passed a resolution accepting the bid of one James Kennedy in the sum of \$96,220, for the construction and erection of said water filtration plant, and thereupon, by such resolution illegally passed as aforesaid, did improperly and illegally authorize the proper officers of the city of Fargo to enter into said contract with said James Kennedy in accordance with said bid." The intervener further alleged "that said contract so made was absolutely void and of no effect; that it was neither made upon any proper basis of plans and specifications as required by law, or in accordance with resolutions instituted and regularly passed as a basis for said contract, nor, in the letting of said contract, comply in any respect with the terms and conditions of the purported plans and specifications, etc." It also alleged that the plans were so drawn as to prevent free and open competition, and that the advertisements for proposals were defective; that the bid of said James Kennedy was absolutely void, and that the common council of the city of Fargo and its officers were wholly without jurisdiction to enter into the said contract. It also alleged "that the said city and its officers, agents, and servants were wholly without jurisdiction and power to issue \$65,000 of bonds bonding said municipality of the city of Fargo for the purpose of constructing said water filtration plant, and further in that behalf intervener, in his capacity as citizen and taxpayer of the city of Fargo, says that the purported issue of bonds is not within the debt limit of the city of Fargo, and is not a legal and valid issue of bonds within the meaning of the Constitution of the state of North Dakota and the statutes governing municipalities, and the provisions of law relating to the construction of water-works for municipalities." It further avers that on or about the 31st

day of May, 1911, there was commenced, in the district court in and for the county of Cass, an action wherein W. J. Price, a citizen and taxpayer of the said city, was plaintiff, and the city of Fargo, a municipal corporation, et al., were defendants, to restrain the officers of said city, including the respondent as treasurer of the city of Fargo, and permanently enjoining the said officers and the said city, and each and all of them, perpetually from certifying and selling the bonds of said city to which reference is hereinbefore made, and from carrying out the terms of the alleged contract with said James Kennedy, and from payment of the cost of construction of said filtration plant, and from proceeding further with the construction and erection of said water filtration plant, and for such other and further relief as in equity the plaintiff might be entitled to; that there never has been any trial or determination of said action, but that the said city of Fargo has answered the said complaint, and, as respondent is informed and verily believes, said action is now pending." The answer in conclusion avers "that said Mitchell's refusal to sign said bonds in his official capacity or otherwise is based upon the facts heretofore set forth upon the pendency of said action testing the validity of said contract, the proceedings leading up to it, and the issue of said bonds as aforesaid, but said Mitchell refused to attack the validity of the issue of said bonds; that said action has never been determined, and, as intervenor is informed and verily believes, that the proceedings relating to the letting of said contract and the issue of said bonds for the construction of said filtration plant as aforesaid are, and all of them, absolutely void and of no effect, and that the pretended issue of said bonds in the sum of \$65,000 is illegal and void and of no effect, and would create an obligation beyond the power of the officers of said city to enter into, and of such a character as would be beyond the debt limit provided for in the Constitution, and create a great burden upon intervenor and other taxpayers of said city."

M. A. Hildreth, for appellant.

Mandamus ought not to issue as an absolute matter of right. See *Emmons County v. Thompson*, 9 N. D. 607, 84 N. W. 385; *High*, Extr. Legal Rem. 307 and cases cited.

Bradford v. San Francisco, 112 Cal. 543, 44 Pac. 912; Adams v. Brenan, 177 Ill. 194, 42 L.R.A. 719, 69 Am. St. Rep. 222, 52 N. E. 314; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; People ex rel. Stephens v. Halsey, 37 N. Y. 344; Throop, Pub. Off. § 816; State ex rel. Graber v. Matley, 17 Neb. 564, 24 N. W. 200; Winn v. Shaw, 87 Cal. 636, 25 Pac. 968; Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037; Colorado Paving Co. v. Murphy, 37 L.R.A. 630, 23 C. C. A. 631, 49 U. S. App. 17, 78 Fed. 28; Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070; Bailey v. Lawrence County, 2 S. D. 535, 51 N. W. 331.

Any interest is sufficient to give a right to intervene. Coffey v. Greenfield, 55 Cal. 382; Kimball v. Richardson-Kimball Co. 111 Cal. 386, 43 Pac. 1111; Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141; People ex rel. Fogg v. Perris Irrig. Dist. 132 Cal. 289, 64 Pac. 399, 773; Bosard v. Grand Forks, 13 N. D. 587, 102 N. W. 164.

Petitioner should be permitted to intervene. State ex rel. Pfister v. Manitowoc, 52 Wis. 427, 9 N. W. 607; Eldridge v. Stockton, 39 Cal. 693; People ex rel. Mott v. Green County, 64 N. Y. 600; People ex rel. Duff v. Booth, 49 Barb. 31; Ricketson v. Milwaukee, 105 Wis. 591, 47 L.R.A. 688, 81 N. W. 864; Foens Bros. Hardware Co. v. Erb, 54 Ark. 645, 13 L.R.A. 353, 17 S. W. 7; Packard v. Hayes, 94 Md. 233, 51 Atl. 32; Sanitary Dist. v. Lee, 79 Ill. App. 169; Field v. Austin, 131 Cal. 379, 63 Pac. 692; Moran v. Thompson, 20 Wash. 536, 56 Pac. 29; Ertle v. Leary, 114 Cal. 238, 46 Pac. 1; Manly Bldg. Co. v. Newton, 114 Ga. 245, 40 S. E. 274; Andrews v. Ada County, 7 Idaho, 453, 63 Pac. 592; Piedmont Paving Co. v. Allman, 136 Cal. 88, 68 Pac. 493; Fay v. Reed, 128 Cal. 357, 60 Pac. 927; McBrian v. Grand Rapids, 56 Mich. 95, 22 N. W. 206.

Any taxpayer or officer of the city had a right to question the validity of the bonds. See Brady v. New York, 20 N. Y. 312; McBrian v. Grand Rapids, 56 Mich. 95, 22 N. W. 206; Wells v. Burnham, 20 Wis. 112; Kneeland v. Milwaukee, 18 Wis. 411; Saunders v. Iowa City, 134 Iowa, 132, 9 L.R.A.(N.S.) 392, 111 N. W. 529; State v. Shawnee County, 57 Kan. 267, 45 Pac. 616; Barber Asphalt Paving Co. v. Hunt, 100 Mo. 22, 8 L.R.A. 110, 18 Am. St. Rep. 530, 13 S. W. 98; Warren v. Barber Asphalt Paving Co. 115 Mo. 572, 22 S. W. 490; Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W.

52; *Kilvington v. Superior*, 83 Wis. 222, 18 L.R.A. 45, 53 N. W. 487; *Ricketson v. Milwaukee*, 105 Wis. 591, 47 L.R.A. 685, 81 N. W. 864.

Emerson H. Smith, W. H. Shure, and Ball, Watson, Young & Lawrence, for respondent.

The action in which leave to intervene was sought was purely a mandamus proceeding to require the city treasurer to perform a municipal duty, and such action was proper. *People v. Hastings*, 5 Ill. App. 436; *State ex rel. Fullheart v. Buckles*, 39 Ind. 272; *Henderson v. State*, 53 Ind. 60; *Rice v. State*, 95 Ind. 33; *State ex rel. Minneapolis Tribune Co. v. Ames*, 31 Minn. 440, 18 N. W. 277; *State ex rel. Ahrens v. Fiedler*, 43 N. J. L. 400; *People ex rel. New York & H. R. Co. v. Havemeyer*, 16 Abb. Pr. N. S. 219, 3 Hun, 97; *Re Freel*, 148 N. Y. 165, 42 N. E. 586, affirming 89 Hun, 79, 35 N. Y. Supp. 59; *State ex rel. Treat v. Richter*, 37 Wis. 275; *People ex rel. Taylor v. Brennan*, 39 Barb. 522; *People ex rel. Hathorn v. White*, 54 Barb. 622; *Pearsons v. Ranlett*, 110 Mass. 118; *Smalley v. Yates*, 36 Kan. 519, 13 Pac. 848; *Angle v. Runyon*, 38 N. J. L. 403; *State ex rel. Compton v. Anderson*, 52 N. J. L. 150, 18 Atl. 586; *Com. ex rel. Century Co. v. Philadelphia*, 176 Pa. 588, 35 Atl. 195.

Petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way. *United States v. Northern Securities Co.* 128 Fed. 812; *Kelsey v. Murray*, 18 Abb. Pr. 294, 28 How. Pr. 243; *Bray v. Booker*, 6 N. D. 526, 72 N. W. 933; *Dickson v. Downs*, 11 N. D. 407, 92 N. W. 798.

Intervener cannot inject new issues into a pending cause by his complaint in intervention, but must take the case as he finds it. *Teachout v. Des Moines Broad-Gauge Street R. Co.* 75 Iowa, 722, 38 N. W. 147; *Powell v. Leicester Mills*, 92 Fed. 115; *Charleston & W. C. R. Co. v. Pope & Fleming*, 122 Ga. 577, 50 S. E. 374.

It was purely a matter in the discretion of the court as to whether the application should be allowed, and there was no abuse of such discretion. *Hocker v. Kelley*, 14 Cal. 165; *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 141; *Teachout v. Des Moines Broad-Gauge Street R. Co.* 75 Iowa, 722, 38 N. W. 147; *Rockwell v. Coffey*, 20 Colo. 397, 38 Pac. 377; *London, P. & A. Bank v. Abrams*, 6 Ariz. 87, 53 Pac. 589;

Jacobs v. Hershey Lumber Co. 124 Wis. 54, 102 N. W. 319; *Scheidt v. Sturgis*, 10 Bosw. 606; *Hart v. Kohn*, 12 Misc. 648, 33 N. Y. Supp. 272; *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 138, (affirmed in 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674); *Koehler v. Brady*, 82 App. Div. 279, 81 N. Y. Supp. 695; *MacArdell v. Olcott*, 62 App. Div. 127, 70 N. Y. Supp. 930; *Wall v. Beach*, 20 App. Div. 480, 47 N. Y. Supp. 33; *Earle v. Hart*, 20 Hun, 75; *Callanan v. Keeseville*, A. C. L. C. R. Co. 48 Misc. 476, 95 N. Y. Supp. 513; *Draper v. Pratt*, 43 Misc. 406, 89 N. Y. Supp. 356; *Allen v. Coe*, 109 Wis. 635, 85 N. W. 492.

BRUCE, J. The intervener and appellant has entirely mistaken his remedy, in so far as the alleged illegality of the contract for the construction of the filtration plant is concerned. Even if it be true (and on this matter we express no opinion) that the contract for the construction of the filtration plant was illegally let, this fact in no manner justifies an intervention in the case at bar. The mandamus proceedings were brought, not to enforce any right or compel any action under the contract for the erection of the filtration plant, nor to obtain any money on such contract from the proceeds of said bonds, but merely to compel the city treasurer to sign bonds for the purpose of negotiation, which had been sold by the city of Fargo to the Minnesota Loan & Trust Company. There is a clear distinction, indeed, between a proceeding which seeks to invalidate an election to determine whether an issue of bonds shall be made, or to invalidate the bonds themselves, and a proceeding which seeks to prevent the payment of the proceeds of such bonds upon an illegal contract. Such being the case, the trial court did not abuse its discretion in refusing to permit appellant and intervener to intervene in the case and to allege and urge the invalidity of such contract. There were, however, other matters in dispute in the original action, for, although the answer of the principal defendant and respondent, Chas. H. Mitchell, did not raise the question in so many words, the original complaint in the mandamus proceedings alleged "that at and during all the times herein mentioned, said city of Fargo has not become indebted, and is not now, and by the sale of such bonds would not become, indebted in an amount exceeding 4 per cent of the taxable property of the said city

of Fargo as determined by the city assessment last preceding the 6th day of July, 1910, and as determined by the city assessment for the year 1911." This was a complete allegation that the city was not indebted beyond its constitutional limit. See § 183, art. 12, Constitution of North Dakota. The answer of Chas. H. Mitchell expressly stated that "his refusal to sign such bonds in his official capacity or otherwise is based upon facts heretofore set forth upon the pendency of such action, testing the validity of said contract, the proceedings leading up to it, and the issue of said bonds as aforesaid; that said action has never been determined, and, as respondent is informed and verily believes, upon consultation with counsel in reference thereto, and advised by said counsel after a full and complete investigation of the facts relating to the letting of said contract and the issue of said bonds for the construction of said filtration plant as aforesaid, such proceedings are, and all of them, absolutely void and of no effect, *and that the pretended issue of said bonds in the sum of \$65,000 is illegal and void and of no effect*, and would create an obligation beyond the powers of the officers of said city to enter into, and of such character as would impose a personal liability upon the respondent and his bondsmen to the amount of said bond given as said city treasurer of the city of Fargo as aforesaid for the faithful performance of his duties." It cannot therefore be said that on these pleadings the issue of the indebtedness of the city of Fargo was not submitted to the trial court, or was not raised by the pleadings themselves. Nor can it be said that the issue of the pending action by W. J. Price against the city of Fargo et al. was not involved or considered, as the same was specially pleaded in the answer. Nor, on the other hand, can it be said that the whole question of the validity of the election was not involved, as all of the facts relating thereto were specially pleaded in the complaint of the principal relator. The intervening petition, therefor, and proposed answer, really raised no new questions. The question, therefore, before this court, is whether, *after a demurrer to the sufficiency of the answer has been argued to the court*, the attorney for the defendant may be allowed to intervene on his own behalf and set up in his answer the same defenses which, if not especially pleaded by the defendant in chief and in the original proceeding, were necessarily involved in the issues which were presented to the court; for the rule of pleading

must be borne in mind that a material allegation in a complaint which is not denied or otherwise met is deemed admitted; or whether, fearing that the principal defendant will not appeal, such attorney, on his own behalf, may intervene in order that he may himself appeal and have the questions determined by the supreme court. We believe that he certainly could not do so as a matter of right, and that it was no abuse of discretion on the part of the trial court to refuse him permission so to do. This is the well-established rule, indeed even in cases where the issues sought to be presented by the intervener were not directly raised by the pleadings in the original case. Section 6825 of the North Dakota Code provides that any person may, *before the trial*, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. "An intervention . . . is made by complaint setting forth the ground upon which the intervention rests, *filed by leave of the court*," etc. This statutory provision is the only one that we have been able to find which permits the proceeding. It is identical in its wording, if not an exact copy of § 387 of the Code of Civil Procedure of California, and is a re-enactment of § 90 of the Code of Civil Procedure of 1877 of the territory of Dakota. It is also, to all intents and purposes, a codification of the general rules of procedure upon the subject which have generally prevailed throughout the United States. See 123 Am. St. Rep. 280, note, et seq. In California, in the territory of Dakota, and everywhere, as far as we are able to ascertain, it has been held that the right, to be exercised as a matter of right, must be claimed *before the trial*, and that, even if the trial court has the right to permit its exercise after the beginning of the trial, it is not an abuse of discretion for him to refuse his permission. Especially should this be the rule where, as in the case at bar, the petitioner knows that the issues he seeks to raise will not be urged, and we should remember that in this case the intervener expressly states that prior to the trial his client (the principal defendant) refused to himself question the validity of the election or of the bond issue. "The said Mitchell," he said, ". . . instructed your petitioner as his counsel . . . to draw an answer setting up, and only setting up, the pendency of an action by W. J. Price against the city of Fargo et al.; that your petitioner repeatedly called Mr. Mitchell's attention to the fact that the validity

of the said bonds was not attacked in said answer, and said Mitchell has refused to attack the validity of the said bonds." It is perfectly clear, indeed, that before the trial he was fully cognizant that the validity of the election and of the bond issue would not be urged with the consent of his client. The language of the supreme court of the territory of Dakota in the case of *Gale v. Frasier*, 4 Dak. 196, 30 N. W. 138, 141, is applicable here. "The next step in the proceeding," the court said, "was a motion and petition of Margaret Frazier in intervention [and], asking to be made a party defendant, and seeking by her complaint to be adjudged a trustee of said lands for the use and benefit of the said defendant, Byron M. Smith. This application was presented by her attorneys, Boyce & Boyce, some of whom had been from the commencement of the proceedings attorneys for the defendant, Smith. . . . Was Margaret Frazier's application made in time? 'An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons,' and is made by complaint setting forth the ground upon which the intervention [rests], '*filed by leave of the court*,' etc. Code of Civil Procedure, § 90. The corresponding provision in the California Code is identical with our own. Iowa is similar, except no leave of court is first to be obtained. In that state the complaint in intervention may be filed as a matter of right before trial by any person claiming to have an interest in the matter in litigation; the complaint, of course, subject to all legal objections the same as any other pleading in the case. We must therefore conclude that this power of permission or refusal was vested in the court by the statute makers for some purpose. None is apparent, unless it be for one of the three reasons presented by the above proposition, viz., that the complaint does not state a proper case for intervention; or, second, that the facts are so imperfectly set forth in the complaint that a cause of action is not presented thereby; or, third, that the application to the court for leave to intervene was not seasonably made. As the first two of these propositions could be taken advantage of after the application had been permitted by the court, either by demurrer or a motion to strike from the files, we are led irresistibly to the conclusion that the sound discretion of the court was to be exercised when required by the last. It is unfortunate, to say the least, but the evidence is abundant in all courts

that litigants with great interests involved are often, by one pretext or another, compelled to submit to vexatious delays in the judicial determination of their rights. To remedy this evil, stringent legislation is sometimes enacted; exhaustive and rigorous rules of court are often adopted. Notwithstanding these, the exercise of the sound discretion which is always vested in the court is very often invoked and exercised by that tribunal in the proper administration of the law. No doubt can be entertained but that a correct interpretation of the statute under consideration is that, if the court was satisfied that any object was sought to be attained other than the proper and speedy adjustment of the matter in controversy, the application for intervention might safely be denied, and the applicant refused [permission] to become a party in the determination of issues which other parties were submitting for judicial adjustment. It may, however, be safely admitted that an abuse of discretion by the trial court would be error; and, while we are not disposed to seriously question the proposition of the learned counsel for the appellant that 'intervention under the Dakota Code is not the mere discretionary privilege grudgingly bestowed, . . . but is a right to be freely exercised,' yet we are of the opinion that it is a right which must be exercised with reasonable diligence, rather than a right which may be toyed with at pleasure, and exercised [as a] *dernier resort*, for the purpose either of gaining additional time or forcing an opponent to meet issues which are suddenly thrust upon him by an entire stranger to the case. . . . If it was so essential to the interest of defendant, Smith, that Margaret Frazier be allowed to come to his assistance, it is somewhat remarkable that it should not be discovered before the cause was called in court for trial. If Smith elected not to adopt the course heretofore suggested, and failed to cite or notify Margaret Frazier to appear and protect him and defend her covenants, we think she was bound to act promptly in the other course. This she did not do. The application under the circumstances came too late, and the court, in the exercise of the discretionary power conferred by the statute, committed no error in denying the motion." See also *Pinkard v. Willis*, 24 Tex. Civ. App. 69, 57 S. W. 892; *Hibernia Sav. & L. Soc. v. Churchill*, 128 Cal. 633, 79 Am. St. Rep. 73, 61 Pac. 279, 280; *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 141, affirmed in 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct.

Rep. 674; *Alley v. Nott*, 111 U. S. 472, 28 L. ed. 491, 4 Sup. Ct. Rep. 495; *State ex rel. Montana C. R. Co. v. District Ct.* 32 Mont. 37, 79 Pac. 546.

We do not wish to be understood as intimating our belief that the intervener in this case sought to intervene for the purpose of delay. We believe, indeed, that he acted in the utmost good faith, and from the highest of motives. We are nevertheless of the opinion that his request was unreasonably delayed, and that the court did not abuse its discretion in refusing its permission. The case of *Gale v. Frazier*, which we have just cited, offers, indeed, a much stronger pretext for intervention than does the one at bar, for in it, though the right to intervene was asked some nineteen months after the issuance of the summons and after what appeared to the court to be an unreasonable delay, it was nevertheless asserted before the trial could, in any sense of the word, have been said to have begun. Here the right was sought after a demurrer had been interposed to the answer and the argument had been had thereon. In the case of *Alley v. Nott*, 111 U. S. 472, 28 L. ed. 491, 4 Sup. Ct. Rep. 495, it was held that a general demurrer to a complaint raised an issue which, when tried, would finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over was granted, and that the argument of such a demurrer was a trial of the action within the meaning of the act of 1875 in regard to the removal of causes. In that case the state court decided the issue against the plaintiff upon the demurrer, but, before entering final judgment, granted a new trial with leave to amend the pleadings. It was held that it was too late to remove the cause. "The trial of such an issue," the court said, "is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding." We are aware of the fact that in a number of cases, noticeably those of *Lipscomb v. State*, 76 Miss. 253, 25 So. 158, and *State v. Kent* (*State v. Pancoast*) 5 N. D. 516, 25 L.R.A. 518, 67 N. W. 1052, it has been held that the trial of an action does not begin until the impaneling of the jury. Practically all, if not all, of these cases, however, are criminal cases, where the final determination of the issues is for the jury, and not the court. In a mandamus proceeding, on the other hand, the final determination is for the court. There is no jury, and a determination of a demurrer would, unless the court granted

leave to amend, be conclusive of the case, and the argument on the demurrer involved the whole of the trial. We also realize that a number of authorities state that the trial begins "after all dilatory proceedings have been overcome." See *Lipscomb v. State*, *supra*. A general demurrer in a mandamus proceeding, however, which settles the whole point in controversy in the litigation, can hardly be said to be a dilatory plea. The main reason for the intervention in this case was that the interveners might be allowed to appeal from the ruling on the demurrer, and thus have the points in controversy definitely settled by the supreme court. So far this court has not conclusively passed upon the identical question before us, and as to when the trial of an action in mandamus cases may be said to have begun. It has, however, on several occasions, considered the question in other proceedings, and the inference from the cases is, we think, clear. See *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 138; *State v. Kent*, *supra*; *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504; *State v. Hazledahl*, 2 N. D. 521, 16 L.R.A. 150, 52 N. W. 315; *Walker v. Maronda*, 15 N. D. 63, 106 N. W. 296. We are quite satisfied that in a mandamus proceeding at any rate, where the issues are tried by the court, and not by the jury, the trial has been begun when a general demurrer has been argued. In any event we are of the opinion that the court did not abuse its discretion in this case.

We have so far dealt with the question of the discretion of the trial judge. We are in serious doubt, however, whether he had any discretion in the premises at all. The statute on the subject is explicit. "Any person may *before trial* intervene," it says, and nowhere is there to be found any provision in the statute for an extension of this time. We have cited authorities which would lead us to believe that the trial has begun when a demurrer has been interposed and argued. In addition to these authorities we call attention to the provisions of our statute. Section 7008, Rev. Codes 1905, provides that "a trial is a judicial examination of the issues between the parties, whether they are issues of law or of fact," while § 7005 provides that "an issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof." We are seriously in doubt, indeed, whether the trial court had really any discretion, and whether his discretion did not merely extend to deciding whether the right of intervention should

be allowed *before the trial*, and that, after the trial had once begun, that discretion was not over. It seems to us, indeed, that, in order to confer upon a trial court the right to allow an intervention after the argument of a demurrer, we must ourselves judicially legislate, and say that when the legislature said "before trial," it meant "at any time before the final judgment."

The judgment of the District Court is affirmed.

PAULSON v. REEDS.

(139 N. W. 1135.)

Opinion filed December 24, 1912.

Appeal by defendant from a judgment of the District Court for Richland county, Honorable *Frank P. Allen*, J., in an action brought to recover a commission.

Reversed.

W. S. Lauder, for appellant.

Wolfe & Schneller, for respondent.

PER CURIAM.

Respondent files a brief in which he confesses error in the proceedings had upon the trial in the above-entitled action to the prejudice of appellant, and asks that the judgment appealed from be reversed and a new trial of the action be ordered. Thereafter in his brief he specifies certain assignments made by appellant which he concedes disclose prejudicial error. In view of this fact, and of the further fact that an examination of the record satisfies us of the merit of the contentions of appellant, we see no occasion for argument or further proceedings in this court. The judgment from which the appeal is taken is therefore reversed, and a new trial granted, with costs to appellant.

OLSON v. McQUEEN.

(139 N. W. 522.)

Statute of frauds—debts of others.

1. Where A and two others, B and C, owned a threshing machine in common, and A offered to sell his one-third interest to D, but, before agreeing to such sale, according to a prior agreement that no transfer could be made without the consent of B and C, arranged for a meeting between all the parties, and, at such meeting, A agreed to convey his one-third interest if B, C, and D would do his threshing for two years and credit the purchase price of the one-third interest in the machine on such threshing bills, the promise of B, C, and D was an original promise, and not a promise to answer for the debt, default, or miscarriage of D.

Statute of frauds—contract not to be performed within year.

2. Where a contract is capable of full performance by one of the parties thereto within a year from the time of its execution, and has been performed by such party, it is not void within the statute of frauds because not in writing, even though the promise of the other party cannot be performed within that time. Under the facts in evidence, therefore, it having been shown that the defendant, A, fully performed his part of said contract by the delivery of his one-third interest in the said machine at the time of the making of such contract, the mere fact that the threshing was required to be done in two successive years did not bring the contract within the statute of frauds.

Opinion filed December 27, 1912.

Appeal from the District Court for Steele County, *Pollock, J.*

Action to recover for services performed. From the order of the District Court refusing an offer of proof by defendant in support of his counterclaim, and verdict directed for the plaintiff, and judgment thereon, defendant appeals.

Reversed.

Statement by BRUCE, J. Plaintiff and respondent sued to recover a balance of \$433.62 and interest, alleged to be owing for threshing done by himself and two others (R. J. Jacobson and William Munyon), and for \$6.90 for money paid on account of the defendant, the interest of Jacobson and Munyon having been assigned to the plaintiff before

the trial. Plaintiff alleged and proved that the original bill amounted to \$1,156.70, and that defendant had paid thereon the sum of \$723.08. This was conceded by both parties. The controversy arises from a counterclaim of \$832, or, rather, \$416, as \$416 thereof was included in the \$723.08 admitted by both parties to have been paid. The issues presented and embraced in this counterclaim were presented to the trial court in the form of an offer of proof, which was objected to by the plaintiff on the grounds: (1) "That by such offer defendant sought to establish a contract by which one party, to wit, the plaintiff, is to be held for the debt, default, or miscarriage of another, to wit, said William Munyon, which contract is not in writing, and that in said offer no written contract is offered; (2) that under the offer defendant sought "to enforce certain rights under a contract the terms of which were not to be performed within one year, and which contract was not in writing." The offer was as follows: "That in the fall of the said year 1908, just previous to the threshing season, plaintiff and the said R. J. Jacobson and the said William Munyon and this defendant met at defendant's farm in said Steele county, North Dakota, and entered into an agreement whereby defendant sold and delivered his one-third interest in and to the said threshing machine, engine, and outfit to the said William Munyon for the agreed price of \$832, which was then and there mutually agreed upon by and between the aforesaid parties, meaning this plaintiff and defendant and the said R. J. Jacobson and William Munyon, should be paid to this defendant by the said plaintiff and the said R. J. Jacobson and William Munyon as partners and owners of the aforesaid threshing rig, said sum of money to be paid in two equal instalments of the sum of \$416 each, and in the manner following, to wit: the plaintiff and said R. J. Jacobson and said William Munyon as partners undertook, promised, and agreed to operate said threshing rig, and to thresh defendant's crop of grain raised and grown on his farm in Steele county, North Dakota, in the proper season of the year 1908 and 1909, and that this defendant in each of said years should have a credit on his threshing account for the sum of \$416, or a total amount of \$832; that pursuant to said agreement the defendant delivered his interest in said threshing rig to this plaintiff and to the said R. J. Jacobson and William Munyon, and that the said last-named three parties did thresh defendant's grain

in the fall of the year 1908, as alleged in paragraph 1 of plaintiff's complaint, and did credit and allow to this defendant upon said threshing account for the year 1908 the sum of \$416 pursuant to the agreement aforesaid; that in the season of the year 1909 defendant raised and grew a crop of grain on his said farm in Steele county, North Dakota, which it was necessary for him to thresh in the proper season of that year, but that the plaintiff and the said Jacobson and William Munyon neglected and refused to thresh the same or any part thereof, though requested and demanded of them by the said defendant so to do at the proper time for threshing the same; and that the defendant was compelled to, and did, engage and cause others to do and perform his threshing in the fall of the year 1909, which plaintiff and the said Jacobson and Munyon had agreed to do and perform pursuant to said agreement; and that the plaintiff and the said R. J. Jacobson and William Munyon, or any of them, have never paid the defendant the said sum of \$416 in threshing as agreed, or otherwise or in any manner whatsoever, and that there is now due and owing to the defendant from the said plaintiff and the said R. J. Jacobson and William Munyon jointly and severally the sum of \$416, with interest thereon at 7 per cent per annum from and since the 1st day of November, 1909, which is claimed as an offset and counterclaim to plaintiff's cause of action; that since the making of the said agreement between said plaintiff and this defendant and the said William Munyon and R. J. Jacobson, and since the delivery of said threshing machine and outfit to said William Munyon, R. J. Jacobson, and plaintiff, Martin Olson, the said Munyon and Jacobson have had open and continuous possession of said threshing machine and outfit."

It was elsewhere proved upon the trial that defendant, McQueen, and Jacobson and Olson had an agreement to the effect that no one of the three parties should sell his interest in the machine without the consent of the others; that defendant had refused to make any binding agreement for the sale of such machine to Munyon until he had first obtained such consent, and that a meeting of all of the parties was arranged for in order that this consent might be obtained. It was proved that it was at this meeting that the sale of the one-third interest in the machine was actually consummated, and that the agreement that Jacobson, Olson, and Munyon should do the threshing for two

seasons for the defendant, and that the defendant should credit the bills therefor upon the purchase price of the machine, was made.

The trial court denied the offer of proof and rejected evidence generally in support of such counterclaim, and directed a verdict for the plaintiff for the sum of \$440.52, the amount sued for. Defendant appeals.

C. S. Shippy, for appellant.

W. J. Courtney, for respondent.

BRUCE, J. (after stating the facts as above). The first point for determination is whether the agreement for the sale of the one-third interest of the defendant, McQueen, in the threshing machine in question for the agreed price of \$832, created an original contract of the said McQueen, Jacobson, and Munyon to pay for the same, or merely a promise on the part of the three to answer for the debt, default, or miscarriage of another (Munyon), within the meaning of the statute of frauds, it being remembered that that other was one of their own number. We are also to determine whether the agreement was incapable of being performed within a year, so as to come within the statute of frauds.

It seems to be well established by the authorities that where a sale of goods is made upon the joint credit and promise of three persons, though the property is furnished and delivered to but one of them, the legal effect as between them and the vendor is a sale to them jointly, and that such a promise is an original one, and not within the statute of frauds. *Smith, Frauds*, § 331; 20 Cyc. 184; *Boyce v. Murphy*, 91 Ind. 1, 46 Am. Rep. 567; *Gibbs v. Blanchard*, 15 Mich. 292. In order, indeed, that the promise shall be considered a promise to answer for the debt or miscarriage of another, it must be collateral to some other or prior promise. The statute does not extend to a joint understanding of two or three persons for the benefit of one of them, unless such one was indebted or had promised before the joint understanding had been arrived at. 29 Am. & Eng. Enc. Law, 924; *Street, Foundations of Legal Liability*, 186; 1 *Brandt, Suretyship & Guaranty*, p. 183. Applying these tests, we are satisfied that the offer of proof presented an original promise, and not one that was collateral and within the stat-

ute. The mere fact that in it counsel for defendant stated that the interest in the machine was "sold and delivered to William Munyon" is in no way conclusive, as these words are controlled by the remainder of the offer, which states positively that the sale or delivery was a part of a joint agreement. The offer, in fact, specifically states that "said William Munyon and this defendant met at defendant's farm in Steele county, and entered into an agreement, whereby defendant sold and delivered his one-third interest in and to said threshing machine to the said William Munyon for the agreed price of \$832, which it was 'then and there' agreed upon by and between the aforesaid parties, meaning this plaintiff and the defendant and the said R. J. Jacobson and William Munyon, should be paid to this defendant *by the said plaintiff and the said R. J. Jacobson and William Munyon as partners and owners of the aforesaid threshing rig. . . . That pursuant to said agreement the defendant delivered his said interest in said threshing rig to this plaintiff and to the said R. J. Jacobson and William Munyon, and that the last three parties did thresh defendant's grain in the fall of 1908.*" This offer of proof clearly intimates an original, and not a collateral, agreement. We think the court erred in rejecting the offer, and that it also erred in refusing to allow the plaintiff to answer, on cross-examination, the following questions, which were objected to on the ground that they sought to disclose a contract which, if made, was required to be in writing: These questions were: "Didn't Mr. McQueen, at the time you four people were together, tell you and Mr. Jacobson that he would not sell the rig to Munyon unless all three of you people would agree and thresh for him in these two falls of 1908 and 1909?" And, "Didn't you and Mr. Jacobson agree then that if Mr. McQueen would sell his one-third interest to Munyon, to do his threshing for him in the fall of 1908 and 1909?" "And on the strength of the agreement that you had made there, didn't Mr. McQueen deliver his one-third interest in the rig to Mr. Munyon?"

The whole question at issue was whether the promise of the three, Olson, Munyon, and Jacobson was an original or a collateral one. The questions excluded were certainly directed to this point of inquiry, and were both competent and material.

But counsel for respondent argues that, in order to reverse the judgment, this court must presume a joint liability of Munyon, Olson,

and Jacobson, and that defendant and appellant now seeks to counterclaim this joint liability against but one of the three parties, Olson, who is the sole plaintiff in the suit. He contends that, by so doing, defendant seeks, in one breath to call the liability joint and joint and several. We do not deem this to be material. The question is not so much as to whether the liability of Munyon and Jacobson and Olson was a joint and several liability, but whether it was an original one. 20 Cyc. 184. But even if it were considered to be joint, and not joint and several, we do not believe that the objection would be valid. Plaintiff sues in this case under the Code, and as the real party in interest. That is to say, as the assignee of a claim held originally by himself and two others. At the common law he would have been compelled to bring the action in the names of his assignors, and if he had done so the right to the counterclaim for damages arising from the joint default in the contract would have been unquestionable. In cases where the assignee sues under the Code as the real party in interest, he assumes the obligations as well as the claims of his assignors. This is too clear for argument. It is quite possible that the defendant need not have counterclaimed at all. He might, no doubt, have allowed a judgment to be recovered against him for the balance claimed to be due upon the threshing bill for 1908, and then, in a separate action, have sued the three original promisors for the failure to do the threshing in the year 1909; but he did not, and was not required to do so. We think that the counterclaim was properly interposed. Rev. Stat. 1905, § 6808; 34 Cyc. 746, 777.

Nor do we believe that the contract was within the statute of frauds, because by its terms it was not to be performed within one year from the making thereof. It is conceded, indeed, that it was fully executed, on one side, by the delivery of the interest in the machine. According to the overwhelming weight of authority, the statute has no application in such cases; and though a few states hold to the contrary, we prefer to follow the majority and almost universal holding. 29 Am. & Eng. Enc. Law, 835, and cases cited.

The judgment of the District Court is reversed, and the cause is remanded for a new trial.

WYLDES, by McLaughlin, Guardian *ad Litem* v. PATTERSON.

(139 N. W. 577.)

Master and servant — servant's injuries — elevators — duty to provide signals question for jury.

1. Where, while in course of construction, material is raised to and lowered from the top of the roof of a building 70 feet high, by a temporary elevator, upon and from which an employee working upon said roof is required to place and remove, empty and fill wheel barrows and such elevator is raised and lowered by means of a drum and pulleys, operated by a steam engine placed in the street, it is for the jury to say whether, under the circumstances of the case, a system of signals was necessary to be provided by the employer in order to render the plan of operation reasonably safe.

Master and servant — servant's injuries — negligence — risk — question for jury.

2. If, in such cases, a system of signals is provided, such system should be communicated to and be required to be enforced by all of the employees interested. When, therefore, the evidence showed that the engineer who operated the engine which lowered and raised the elevator relied upon a system of signals which the foreman in control of the plaintiff had, a short time prior to the accident, ordered discontinued, and that the plaintiff himself was led to believe that such system was not in operation, it cannot be said, as a matter of law, either that the employer had discharged his duty in that behalf, or that such employee, who is injured by a sudden lowering of the elevator, had assumed the risk of such confusion of method. So, too, the adequacy and reasonable sufficiency of the system of signals provided, if system there was, was for the jury, and not for the court, to pass upon.

Pleading — sufficiency — verdict.

3. Pleadings examined, and *held* to be sufficient to support a verdict under the particular facts of the case, if the evidence of the plaintiff is believed by the jury.

Note.—The authorities on the master's duty to warn or instruct servants, generally, are reviewed in an elaborate note in 44 L.R.A. 33. And particularly, as to the master's duty to instruct servant as to danger to which he is exposed, see note in 41 L.R.A. 143. And for a note on the duty to protect or warn against dangers not reasonably to be apprehended, see 21 L.R.A.(N.S.) 89.

On the question whether a servant may assume the risk of dangers created by the master's negligence, see notes in 4 L.R.A.(N.S.) 848, and 28 L.R.A.(N.S.) 1215.

Trial — direction of verdict — error.

4. It is error to direct a verdict where the evidence on which such direction is asked and based is disputed by the physical facts of the case.

Opinion filed December 28, 1912.

Appeal from the District Court for Burleigh County, *Winchester*, J. Action for damages sustained by reason of personal injuries received by plaintiff while in the employ of defendant. From a directed verdict for defendant, plaintiff appeals.

Reversed.

Statement by BRUCE, J. Plaintiff, a minor about nineteen years of age, brings this action through his guardian to recover damages for personal injuries received by him while in defendant's employment as a common laborer engaged in and about the construction of a seven-story hotel building in the city of Bismarck. The accident occurred during the time the roof of such building was in course of construction. Plaintiff at such time being in the act of placing a wheelbarrow on a temporary freight elevator which had been erected in the street some 4 feet out from the east wall of the building at the base, and a foot or a foot and a half from the cornice work at the summit of the building, for the purpose of permitting it to be lowered to the ground to be re-filled with roofing material. While in the act of placing such wheelbarrow on the elevator lift, such elevator lift was suddenly and without warning lowered, and plaintiff in some manner was thrown or drawn onto such elevator lift, and the force of the fall, or the sudden stoppage of the elevator by the engineer after such fall, caused the wire cable to part, and he was precipitated to the ground, receiving the injuries complained of.

The complaint alleges that defendant was guilty of the following acts of negligence, which proximately caused the injuries: (1) That such elevator and scaffold were improperly erected and unfit for the purposes for which they were used, in that the cable and fastenings used to operate such elevator were weak and defective, and not of the proper strength and weight for the purposes used; (2) that no appliance was used or supplied to prevent the cage of the elevator from falling in case of the parting of the cable, or the happening of any other con-

tingency by which the cage might become loose or disconnected from the fastenings; (3) that the said elevator cable and fastenings were not properly inspected, repaired, or replaced, but were allowed to become worn, weak, and defective, and out of repair; (4) that the said steam engine used to operate the elevator was so inclosed that the engineer or person operating the same could not see the landing where the elevator stopped; (5) that no electrical or other proper system of signals was provided for said elevator; (6) that the elevator cage was suddenly and without warning lowered from in front of said landing, and the plaintiff, who was then about to roll a wheelbarrow on the said lift, without negligence on his part, was drawn forward onto the said lift with great force and violence. The answer puts in issue the averments of the complaint as to the defendant's negligence, and alleges that the accident was caused solely by plaintiff's own negligence and that of a fellow servant; and also that such accident arose from the dangers and risks incident to such employment, which dangers and risks were knowingly assumed by plaintiff.

At the conclusion of the testimony a verdict was directed against the plaintiff on defendant's motion, and the appeal is from the judgment entered in defendant's favor pursuant thereto.

Miller & Costello, for appellant.

It is not necessary to allege specifically that the master failed to instruct, the general allegation of negligence being sufficient. *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 306, 13 Am. Neg. Cas. 442; *Texas & P. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511.

It is breach of duty of master to expose an inexperienced servant to danger, even with his consent. *Hughes v. Chicago, M. & St. P. R. Co.* 79 Wis. 264, 48 N. W. 259.

Capacity of infant to appreciate dangers, if any, of employment, is a question for the jury. *Costello v. Judson*, 21 Hun, 396; *James v. Rapides Lumber Co.* 50 La. Ann. 717, 44 L.R.A. 33, 23 So. 469; *Brazil Block Coal Co. v. Young*, 117 Ind. 525, 20 N. E. 423; *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200; *Mundhenke v. Oregon City Mfg. Co.* 47 Or. 127, 1 L.R.A.(N.S.) 278, 81 Pac. 977.

Results of experiments not permitted to be given in evidence unless first shown that conditions are in all respects substantially identical with those existing at the time of the accident. *Libby, McNeill & Libby v. Sherman*, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801; *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Com. v. Piper*, 120 Mass. 185; *Eidt v. Cutter*, 127 Mass. 522; *State v. Justus*, 11 Or. 178, 50 Am. Rep. 470, 8 Pac. 337, 6 Am. Crim. Rep. 511; *Klanowski v. Grand Trunk R. Co.* 64 Mich. 279, 31 N. W. 275.

Tendency of such evidence is to mislead jury. *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Hurst v. Chicago, R. I. & P. R. Co.* 49 Iowa, 76.

Question of negligence of defendant, and contributory negligence of plaintiff, were questions of fact for the jury. *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 306, 13 Am. Neg. Cas. 442.

To charge plaintiff with contributory negligence, the evidence must be clear and the facts undisputed. *Field, Damages*, p. 519; *Beach, Contrib. Neg.* § 447.

Duty of master to furnish reasonably safe instrumentalities, and see that they are kept in safe condition; and plaintiff assumed no risks incident to failure of master to furnish safe instrumentalities. *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; *Cook v. St. Paul, M. & M. R. Co.* 34 Minn. 45, 24 N. W. 311, 16 Am. Neg. Cas. 247; *Hooper v. Great Northern R. Co.* 80 Minn. 400, 83 N. W. 440, 8 Am. Neg. Rep. 453; *Perras v. A. Booth & Co.* 82 Minn. 191, 84 N. W. 739, 85 N. W. 179, 9 Am. Neg. Rep. 328.

Question of what risks are assumed by minor is one for the jury, and if he has not been instructed as to dangers of his employment, the jury must determine from all the facts whether he has acquired sufficient knowledge of the danger to exempt the employer from liability. *Johnson v. Griffiths-Sprague Stevedoring Co.* 45 Wash. 278, 8 L.R.A. (N.S.) 432, 88 Pac. 193; *Siegel, C. & Co. v. Trecka*, 218 Ill. 559,

2 L.R.A.(N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166; Roth v. Northern Pacific Lumbering Co. 18 Or. 205, 22 Pac. 842; Bare v. Crane Creek Coal & Coke Co. 61 W. Va. 28, 8 L.R.A.(N.S.) 284, 123 Am. St. Rep. 966, 55 S. E. 907; Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366.

Cochrane & Bradley (P. J. McLaughlin of counsel), for respondent.

Not the master's duty to warn or instruct, where no amount of warning or instruction will make the danger plainer to the employee than it is made by the use of his own eyes. Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; Beleal v. Northern P. R. Co. 15 N. D. 322, 108 N. W. 33, 20 Am. Neg. Rep. 453; Carlson v. Sioux Falls Water Co. 8 S. D. 47, 65 N. W. 419; Dunn v. Great Lakes Dredge & Dock Co. 161 Mich. 551, 126 N. W. 833; Kraczek v. Falk Co. 142 Wis. 570, 126 N. W. 30; Galloway v. J. W. Turner Improv. Co. 148 Iowa, 93, 126 N. W. 1033; Ward v. Connor, 182 Mass. 170, 64 N. E. 968; Sutton v. Des Moines Bakery Co. 135 Iowa, 390, 112 N. W. 838; Fischer v. Goldie, 132 Mich. 574, 94 N. W. 5.

Experiments made under similar, though not identical, circumstances, are admissible. Burg v. Chicago, R. I. & P. R. Co. 90 Iowa, 117, 48 Am. St. Rep. 419, 57 N. W. 680; Missouri P. R. Co. v. Moffatt, 56 Kan. 673, 44 Pac. 607, 11 Am. Neg. Cas. 554; Eidt v. Cutter, 127 Mass. 524; Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 238, 51 L.R.A. 781, 86 Am. St. Rep. 478, 59 N. E. 657; Krueger v. Brenham Furniture Mfg. Co. 38 Tex. Civ. App. 401, 85 S. W. 1156; Smith v. State, 2 Ohio St. 518; Byers v. Nashville, C. & St. L. R. Co. 94 Tenn. 354, 29 S. W. 128.

BRUCE, J. The rule which excuses a master for the negligence of a coemployee was not recognized at all in the common law prior to the year 1837, or in America prior to 1838. In the parent case of Priestley v. Fowler, 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42, 19 Eng. Rul. Cas. 102, the servant of a butcher was injured by the overloading of a butcher's wagon by a fellow servant, and in which he was directed by his master to ride. The case was clearly one in which the servant could reasonably and easily have protected himself, and was evidently decided upon that theory. "The

mere relation of the master and the servant never can imply," says the court, "an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master; and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford." This was a case and employment where each servant could watch the other, and each, by controlling the action of the other, could protect himself. It was a case in which the instinct of self-preservation could be made effective for the prevention of accidents. The extension of the rule to persons in a common employment, whether they can control the actions of each other or not, is hardly justified by the decision. When justified, it has only been upon the theory of an implied contract entered into at the time of the employment, and not upon the theory of the opportunity of self-protection. See *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L.R.A. 97, 26 Am. St. Rep. 621, 48 N. W. 222.

But even if there is such an implied contract, it is not the only one. The rule that the master shall furnish his servants with reasonably safe premises and appliances with which and on which to work, and that the master himself shall not be negligent, is just as much a part of

the implied contract of employment as is the agreement that the master shall not be liable for the negligence of a fellow servant. It is incumbent upon the master to furnish reasonably safe premises on which to work, and a reasonably safe theory and method of work. In the case at bar it was for the jury to say whether the method of raising brick and other material from the street to the roof by means of the elevator, and which was accompanied by the placing upon and withdrawing from the elevator of wheelbarrows, required a system of signals in order to render it reasonably safe. It was for them, also, to say whether, if a system was shown to have been provided, that that system was reasonably adequate. If, in the opinion of the jury, the signals were reasonably necessary, then the arrangement for the giving of those signals was a matter peculiarly within the control and duty of the employer, and it was incumbent upon him to see that the system, whatever it was, should be generally understood by those who were liable to be affected by it. It was incumbent upon him, even if he could not furnish an absolutely safe elevator system, to, at any rate, see that that elevator was so managed that, if his instructions were carried out, the plan of operation would be as nearly safe as would be reasonably possible. The evidence is undisputed in this case that the plaintiff was acting under the direction of the foreman at the time of the accident, though, of course, we realize that he testified that he would probably have gone on with the work whether directed to by the foreman or not. The evidence is also clear that no definite system of signals was arranged or provided for, or, if there was a system of signals, that that system was not generally known. The witness, Patterson, the employer and owner of the building, and the defendant in this suit, as well as his engineer, Orcott, testified that a system of signals was provided which consisted of raising and lowering the hands. The plaintiff testified that no system of signals was provided for at all. The foreman, who had supervision of the plaintiff, testified that formerly a system of signals had been used, but that for a short time prior to the accident he had ordered their discontinuance. There was other testimony to the effect that the rule was that when the plaintiff stepped back and straightened up, the elevator should be lowered. It is perfectly plain that no three of the men directly interested were agreed upon any given system; and that the foreman and the engineer, the

plaintiff and the engineer, and the plaintiff and the employer, had entirely different views as to what the system was. The engineer positively testified that he acted in response to the "down signal," the signal given by lowering the hands, and that that was the signal which was agreed upon. The plaintiff, on the other hand, was led to believe that no such signals were provided for. We are of the opinion that, under the state of the evidence and the pleadings, it was for the jury, and not for the court, to decide whether the plaintiff was negligent in not providing a proper system of signals, and whether the injury to the plaintiff was the result of such negligence. *Savino v. Griffin Wheel Co.* 118 Minn. 290, 136 N. W. 876; *Hunter v. North Iowa Brick & Tile Co.* — Iowa, —, 136 N. W. 515; *Polaski v. Pittsburgh Coal Dock Co.* 134 Wis. 259, 14 L.R.A.(N.S.) 952, 114 N. W. 437.

Nor do we believe that the doctrine of the assumption of risk could be invoked by the court as a matter of law. What risk, it may be asked, did the plaintiff assume? The risk of "the down signal" being mistaken? The risk attendant upon a system where no signals were to be given at all? The plaintiff certainly did not assume the risk of the employer failing to acquaint all of his employees with the signals or system agreed upon, so that he and the foreman and the engineer had totally different understandings in regard to the matter. The employee is not, under any of the cases, held to assume the risk of a breach of duty which is personal to the employer.

Another reason why the judgment of the trial court should be reversed is that, as we look upon it, the evidence is by no means positive and undisputed that the engineer could have seen the plaintiff far enough back upon the roof to be able to operate the machinery with a reasonable degree of safety, and that the down signal system, or the stepping back and straightening up system, if agreed upon, was, in any way, adequate. The testimony shows that after the cornice was put upon the roof, the elevation of the building was some 70 feet; that the engine house was situated about 20 feet east from the line of the building, and that the cornice extended out 3 feet. The photographs show that the top of the cornice was above the general level of the roof, and that the 10-foot plank on which the plaintiff wheeled his barrow was on an incline. The further back from the edge, therefore, that the plaintiff was, the less clearly could he be seen. A simple application of the

laws of mathematics and of optics will show that, if these distances and measurements are correct, the engineer, if standing in the engine room, could not possibly have seen a man standing about 2 feet from the edge of the roof or cornice, unless such man had been 7 feet, 6 inches tall, and even then could only have seen the top of his head; and, conversely, that a man standing on the roof, and 2 feet back from the edge of the cornice, could not have seen the engineer even if the view had been unobstructed, unless his eyes had been on the top of his head, and he had been 7 feet, 6 inches tall. If the engineer had been 25 feet from the building, the man on the roof, in order to be seen 2 feet back, must have been 6 feet 4 inches tall, and then only the top of his head could have been seen. Practically all of the witnesses for the defendant testified that the plaintiff could have been seen if standing 2 feet back from the edge, from the waist upwards. Some even testified that he could have been seen from the knees up. The physical facts absolutely contradict the testimony of these witnesses. We are quite satisfied, indeed, that when the building was only a few stories high a man in the engine room could have had full view of the plaintiff while upon the roof, but the evidence falls far short of proving this fact after the cornice had been constructed and the building practically completed. At any rate, the evidence is not so conclusive that the court was justified in taking the case from the jury.

It has been argued, however, that no foundation is laid in the pleadings for the introduction of evidence as to a defect in the plan of operation, or the system of signals, and that a recovery cannot be based thereon. The contention, in short, is made that the allegation of negligence in this respect is not alleged to have been the proximate cause of the accident, and that a recovery, therefore, cannot be had thereunder. We do not so construe the complaint. It is not, it is true, drawn with that degree of care which we would like. No demurrer, however, was interposed to it, and no objection to the introduction of evidence thereunder was made, nor was there any motion to make more definite and certain. It certainly charges that the defendant lowered the elevator suddenly and without warning; and the evidence of the plaintiff, if believed by the jury, could be properly construed both as proving that negligence, and that the sudden lowering was the result of the defective system of signals. The complaint was vulnerable to

a motion to make more definite and certain, and, at the common law, would have been vulnerable to a special demurrer. We cannot say, however, that, not having been objected to, it was incapable of supporting a verdict under the evidence submitted.

The case, in our opinion, is one which should have been submitted to the jury. The judgment of the District Court is reversed, and a new trial ordered.

ILDVEDSEN v. FIRST STATE BANK OF BOWBELLS.

(139 N. W. 105.)

Attachment—priority over prior unrecorded deed.

1. Plaintiff invokes the statutory remedy to determine adverse claims to real property, alleging in her complaint that she is the owner in fee of the property. Defendant answers, denying such ownership in plaintiff and alleging that on April 25, 1911, one Peter Ildvedsen was the record owner of an undivided one-half interest in such property, and that on such date it caused a writ of attachment to be levied pursuant to law on such undivided one-half interest, in an action brought by it against said Peter Ildvedsen. That thereafter it recovered a judgment in such action against said Ildvedsen, which was on August 9, 1911, duly docketed in the clerk's office, under which judgment execution was duly issued, and such undivided one-half interest sold to defendant to satisfy such judgment, and a sheriff's certificate on such sale was duly issued to it by the sheriff.

Held, that the rights of defendant under such attachment and execution sale are superior to the alleged rights of plaintiff under an unrecorded deed executed and delivered to her by her husband, the defendant in the attachment suit.

Attachment—prior unrecorded deed.

2. Under § 5038, Rev. Codes 1905, an unrecorded deed is void as against subsequent purchasers in good faith and for a valuable consideration whose conveyance is first duly recorded; and also as against any attachment levied on the property or any judgment lawfully obtained against the person in whose name the title to such land appears of record, prior to the recording of such conveyance. Said statute is construed, and *held* that the words, "in good faith," have reference not only to subsequent purchasers, but to attachment and judgment creditors as well.

Note.—For an elaborate discussion of the authorities on the question of possession as notice of title, see note in 13 L.R.A.(N.S.) 51.

Notice — of rights under unrecorded deed.

3. The record title to the property in question stood in the names of plaintiff and her husband as tenants in common, and it is accordingly held that plaintiff's possession of the premises was not sufficient to impute to defendant notice or knowledge of rights acquired by her under the unrecorded deed.

Notice from possession — presumption.

4. Plaintiff's possession being consistent with the record title which disclosed such tenancy in common, she is presumed to have held such possession in subordination to the rights of her cotenant as thus disclosed by the public records.

Notice — of rights under unrecorded deed.

5. Other facts found by the trial court relative to plaintiff's possession of the premises, examined and held insufficient to impute to defendant notice of her rights under such unrecorded deed.

Attachment — claim of homestead.

6. The contention of respondent's counsel that the premises were the homestead of the plaintiff and family at the time the attachment was levied and the judgment entered is without foundation, either in the pleadings or in the facts as found by the trial court, and the judgment in plaintiff's favor quieting her title cannot therefore be sustained on such ground.

Attachment — affidavit.

7. The attachment affidavit examined and held not vulnerable to the attack made upon it by respondent's counsel.

Opinion filed November 25, 1912. Rehearing denied December 30, 1912.

Appeal by defendant from a judgment of the District Court for Ward County, in plaintiff's favor in an action to quiet title to certain property, *K. E. Leighton, J.*

Reversed.

Coyle & Herigstad, for appellant.

Creditor levying his attachment without notice of a prior unrecorded deed is entitled to priority over the grantee under the unrecorded deed. 4 Cyc. 638. See also *Wahrenberger v. Waid*, 8 Colo. App. 200, 45 Pac. 518; *Jerome v. Carbonate Nat. Bank*, 22 Colo. 37, 43 Pac. 215; *Haines v. Connell*, 48 Or. 469, 120 Am. St. Rep. 835, 87 Pac. 265, 88 Pac. 872; *Perkins v. Adams*, 16 Colo. App. 96, 63 Pac. 792; *Thomson v. Shackelford*, 6 Tex. Civ. App. 121, 24 S. W. 980; *Caldwell v. Bryan*, 20 Tex. Civ. App. 168, 49 S. W. 240; *R. E. Bell Hardware Co. v. Riddle*, 31 Tex. Civ. App. 411, 72 S. W. 613; *Atty. Gen. v.*

Massachusetts Ben. Life Asso. 173 Mass. 378, 53 N. E. 879; D'Arcy v. Mooshkin, 183 Mass. 382, 67 N. E. 339; Ray v. Smith, 218 Ill. 182, 75 N. E. 921; Dutton v. McReynolds, 31 Minn. 66, 16 N. W. 468; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; Red River Valley Land & Invest. Co. v. Smith, 7 N. D. 236, 74 N. W. 194; Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390.

As to what constitutes sufficient notice of an unrecorded deed, see Security Sav. & T. Co. v. Loewenberg, 38 Or. 159, 62 Pac. 647; Parker v. Prescott, 86 Me. 241, 29 Atl. 1007; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136; Welch v. Ketchum, 48 Minn. 241, 51 N. W. 113; Bank of Ada v. Gullikson, 64 Minn. 91, 66 N. W. 131; Red River Land & Invest. Co. v. Smith, 7 N. D. 236, 74 N. W. 194; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; Wahrenberger v. Waid, 8 Colo. App. 200, 45 Pac. 518; Lewis v. Atherton, 5 Okla. 90, 47 Pac. 1070; Schumacher v. Truman, 134 Cal. 430, 66 Pac. 591; Kirby v. Tallmadge, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349.

Noble, Blood, & Adamson and Palda, Aaker, & Greene, for respondent.

Facts sufficient to put an attaching creditor upon inquiry are sufficient notice of plaintiff's title. German Sav. Bank v. Armour Packing Co. — Iowa, —, 75 N. W. 503; McLaughlin v. Shepherd, 32 Me. 143, 52 Am. Dec. 646; Riddle v. Miller, 19 Or. 468, 23 Pac. 807; McDaniels v. Flower Brook Mfg. Co. 22 Vt. 274.

Omission of affidavit for attachment will render any subsequent proceedings void, in the absence of any saving provision in the statute to the contrary. 3 Enc. Pl. & Pr. 4; William Deering & Co. v. Warren, 1 S. D. 35, 44 N. W. 1068.

FISK, J. This is the statutory action to determine adverse claims to real property. The property involved consists of lots 13, 14, and 15 in block 4 of the original town site of the city of Minot. Plaintiff recovered judgment in the court below, quieting her title as prayed for in the complaint, and the appeal brings the cause here for trial *de novo*.

The facts were stipulated, and consequently the findings of fact of

the trial court are not in dispute. Such findings are in substance as follows:

"1. That the property involved in this action is described as lots 13, 14, and 15 of block 4 of the town site of Minot, Ward county, North Dakota.

"2. That for three years next prior to the 25th day of April, 1911, the record title to said property was in the name of Peter Ildvedsen and Rakkell Ildvedsen, and that the said Peter Ildvedsen was the husband of the plaintiff, Rakkell Ildvedsen, until divorced.

"3. That about August 10, 1910, the plaintiff, Rakkell Ildvedsen and her husband separated, and the plaintiff at said time commenced an action for divorce against the said Peter Ildvedsen, and since August 19, 1910, she has lived separate and apart from the said Peter Ildvedsen, he not having lived on the premises.

"4. That the attorney who prepared the summons and complaint in said action for divorce in behalf of the plaintiff was J. J. Coyle, one of the attorneys for the defendant in this action; that prior to December, 1910, the said J. J. Coyle was duly discharged and released as attorney for the said Rakkell Ildvedsen, and Arthur Le Sueur and Noble, Blood & Adamson were employed by plaintiff as her attorneys in said divorce action.

"5. That on the 17th day of April, 1911, a decree of divorce was made and entered in said action in favor of plaintiff and against the said Peter Ildvedsen, and that on said date the said Peter Ildvedsen deeded by quitclaim deed all of his right, title, and interest in and to the property described in this action to the plaintiff Rakkell Ildvedsen; that said deed was never recorded; that the defendant in this action or its attorney, J. J. Coyle, had no actual knowledge of the execution or delivery of said deed prior to September 14, 1911.

6. That at and prior to the 17th day of August, 1910, and ever since said date, the plaintiff in this action has been in continuous actual possession of and resided in the building located upon the property described herein.

"7. That on the 25th day of April, 1911, Coyle and Herigstad, a firm of attorneys composed of the said J. J. Coyle hereinbefore referred to, and one O. B. Herigstad, instituted an action in behalf of the First

State Bank of Bowbells, as plaintiff, and against the said Peter Ildvedsen and one Ralph Abbott, as defendants, and in said action did file and serve a notice of attachment in favor of said plaintiff, which is the defendant in this action, on the property above described.

"8. That in making the levy of said attachment the notice of levy was served on the 25th day of April, 1911, by Hans Hovind, deputy sheriff of Ward county, North Dakota, upon the plaintiff herein, by delivering to and leaving with the plaintiff upon said premises the notice of said attachment, and as part of the return of said deputy sheriff he thus stated: 'I further certify and return that I served a copy of the with notice of attachment upon Mrs. Peter Ildvedsen, the occupant of the above-described lots on the 25th day of April, 1911.'

"9. That the said Mrs. Peter Ildvedsen named in said sheriff's return was the same person as the plaintiff in this action, to wit, Rakkell Ildvedsen.

"10. That the plaintiff herein was not a party plaintiff or defendant in the said action in which the said attachment was levied, nor was she served with summons and complaint in said action, and the only papers served upon her was the notice of levy hereinbefore referred to; that she filed no third-party claim or other appearance in said action.

"11. That the affidavit for attachment, omitting formal parts, is in words and figures as follows:

" 'John J. Coyle, being first duly sworn on oath says that he is one of the attorneys for the plaintiff in the above-entitled action. That a cause of action exists against the defendants and in favor of the plaintiff herein for moneys had and received, as shown by the verified complaint in this action which was filed in this court on the 25th day of April, A. D. 1911.

" 'That the defendant is about to remove his residence from the county where he resides, with intentions permanently changing the same, and fails or neglects on demand to give security for the debt upon which this action is commenced.

" 'That the debt upon which the action is commenced was incurred for property obtained under false pretenses.

" 'And prays that a writ of attachment may be allowed and issued

against the property of the said defendants herein, according to the statute in such case provided.

“ ‘John J. Coyle.

“ ‘Subscribed and sworn to before me this 25th day of April, 1911.

“ ‘Omon B. Herigstad,

“ ‘(Seal.)

Notary Public, North Dakota.’

“12. That the complaint filed in said action is the ordinary complaint upon a promissory note, alleging the execution and delivery by Peter Ildvedsen and Ralph Abbott of their promissory note for the sum of \$1,500, dated September 7, 1910, and payable six months after date, with interest at 12 per cent per annum, no part of which has ever been paid, and containing a prayer for judgment for the amount thus due.

“13. That the said affidavit and complaint are the only affidavit and complaint in said action.

“14. That it was proven by the testimony that, prior to the levy of the said attachment, the plaintiff presented said quitclaim deed to the register of deeds of Ward county, to be recorded, and that the said register of deeds refused to record the same, for the reason that there was a large amount of unpaid taxes against the property.”

From such findings of fact the court, as conclusions of law, held as follows:

“1. That the possession of the plaintiff was sufficient to constitute notice on the part of the defendant of the plaintiff’s rights, and that she was owner under the said quitclaim deed prior to and at the time of the levy of said attachment.

“2. That the rights of the defendant in this action, by reason of the said attachment, are subsequent and inferior to any rights in the premises had or owned by the plaintiff at the time of the levy of said attachment.

“3. That as against the said defendant, the plaintiff was and is the owner of the full legal and equitable title, and the plaintiff is entitled to a judgment against the defendant quieting title in the plaintiff as against the defendants, and barring the defendant from any right, title, or interest in or to the said premises as against any rights therein claimed by the plaintiff.

"4. That the plaintiff is entitled to judgment against the defendant for the costs and disbursements of this action.

"Let judgment be entered accordingly.

"By the Court, K. E. Leighton, Judge."

The appellant challenges the correctness of such conclusions from the facts thus found. It is, in brief, appellant's contention that, through its attachment proceedings and judgment against Peter Ildvedsen, it acquired rights in such lots superior to any rights acquired by plaintiff under the unrecorded quitclaim deed from her husband of an undivided one-half interest therein, it being its contention that plaintiff's possession of the lots in question was not sufficient to impart notice to it of any interest acquired by her under such quitclaim deed, and that under the statute of this state the lien acquired by the docketing of defendant's judgment was and is superior to plaintiff's rights under such unrecorded deed.

It being a conceded fact in the case that defendant had no actual notice of such unrecorded deed at or prior to its levy and sale, we are required to determine whether it had constructive notice thereof by virtue of plaintiff's possession of the property. If defendant made its levy and docketed its judgment in good faith and without any notice, actual or constructive, of such unrecorded deed, then it is clear under the provisions of § 5038, Rev. Codes 1905, that it acquired rights in the premises superior to any rights acquired by plaintiff under such deed. Section 5038 provides that every "conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any part or portion thereof, whose conveyance . . . is first duly recorded; or as against . . . any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance." The amendment to this statute as adopted by chapter 152, Laws 1903, was borrowed from our sister state of Minnesota; and the supreme court of that state had, prior thereto, placed a construction upon such statute in numerous cases, holding that the words, "in good faith," not only applies to subsequent purchases, but also to attachment and judgment creditors. *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281; *Johnson v. Robinson*, 20 Minn. 189, Gil. 169; *Golcher v. Brisbin*,

20 Minn. 453, Gil. 407; Wilkins v. Bevier, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. 157; Northwestern Land Co. v. Dewey, 58 Minn. 359, 59 N. W. 1085. The correctness of the settled construction thus adopted is not challenged by counsel in the case at bar, but appellant contends that plaintiff's possession was not sufficient to impugn its good faith. In this contention we feel obliged to assent. The record in the register of deeds' office disclosed that plaintiff and her said husband were tenants in common of these lots. At no time since the giving of the unrecorded deed by Peter Ildvedsen to plaintiff has there been any visible or notorious change in the possession, sufficient to impart notice to the public of such deed. Plaintiff's possession at all times has been perfectly consistent with the record title, which disclosed such tenancy in common, and she is therefore presumed to have held such possession in subordination to the rights of her cotenant as thus disclosed by the public records. This is a well-established rule. Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136; Kirby v. Tallmadge, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349; Schumacher v. Truman, 134 Cal. 430, 66 Pac. 591; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Dutton v. McReynolds, 31 Minn. 66, 16 N. W. 468; Motley v. Jones, 98 Ala. 443, 13 So. 782.

Wade on Notice, 2d ed. at § 290, states the rule as follows:

"Another essential feature of the possession which is set up as notice to a subsequent purchaser is that it must be *exclusive*, at least so far as such subsequent purchaser's grantor is concerned. Accordingly, where a father conveyed to his son, upon certain conditions, an undivided one third of a farm, which was at the time occupied by them as tenants in common, and the son removed from the farm during the life time of the father, who remained in sole possession, it was held that the possession of the father would not be notice to parties to whom the son subsequently mortgaged his interest, unless notice could be brought home to the mortgagees, at the time such mortgage was given, not only of the father's possession, but that it was held adversely to his cotenant. This was so held upon the familiar principle that the possession of real estate by one of several tenants in common will not be construed as adverse to his cotenants, for the reason that such possession is perfectly consistent with the extent of his own interest in the land. To render his occupancy adverse to those who have an undivided interest in the

premises, there must be positive and overt acts connected with his exercise of ownership, such as will manifest an unmistakable intention on his part to exclude his cotenants from the enjoyment of the property; otherwise his possession will be regarded not only as a declaration of his own proprietary rights, but those of his cotenants as well."

Applying this well-settled rule to the facts herein, we reach the conclusion that plaintiff's possession did not operate to put defendant on inquiry as to her rights under such unrecorded deed.

But it is respondent's contention that, aside from the question of plaintiff's possession, there were facts sufficient to put defendant on inquiry. Our attention is called to the fact that one of appellant's attorneys in the attachment suit was plaintiff's attorney for a short time in the divorce action brought by her against her husband, and it is urged that this fact is sufficient to impart to appellant notice of her rights under such unrecorded deed. It is also urged that appellant had knowledge of the fact that Peter Ildvedsen was out of possession, because notice of the levy of the attachment could not be made on him, and was made on Mrs. Ildvedsen as the person in possession. Also that in the attachment affidavit it was stated that defendant was about to change his residence from the county permanently. While it is no doubt true, as contended by respondent, that facts sufficient to put an attaching creditor upon inquiry are sufficient notice of plaintiff's title, we cannot concur in the view that the facts here disclosed are sufficient to bring the case within the rule aforesaid. Being a cotenant with his wife as disclosed by the public records, Peter Ildvedsen's absence from the premises in no manner operated as constructive notice that he had parted with his title, and even if knowledge of the pendency of the divorce proceedings was imputed to appellant at the time of its levy of the attachment and the entry of its judgment, which we very seriously doubt, still we do not think such imputed knowledge would be sufficient to put appellant upon inquiry as to the further fact of Peter's unrecorded transfer of these lots to his cotenant, the plaintiff.

But one other matter needs consideration. It is urged by respondent that the premises constituted the homestead of the Ildvedsens and their family at all times mentioned, and consequently the appellant's levy and sale were a nullity. It is, of course, plain that if such premise is correct, the conclusion is inevitable. The difficulty with such con-

tention lies in the fact that the record does not disclose the homestead character of the premises. The evidence consists merely of a stipulation between the parties, and the findings of fact embody merely such stipulated facts, and the question as to the homestead character is not covered therein. Not only this, but the pleadings raise no such issue. The complaint is in the statutory form to determine adverse claims, and it is therein alleged that plaintiff "is the owner in fee" of the lots described. In view of such facts we deem it improper to remand the case, as requested at the argument, for the purpose of permitting proof of the homestead character of the premises.

We find no merit in respondent's contention that the attachment affidavit is insufficient. See *Hilbish v. Asada*, 19 N. D. 684, 125 N. W. 556.

The judgment appealed from is reversed, and the District Court is directed to enter judgment in defendant's favor as prayed for in the answer.

SAUNDERS v. HARRIS.

(139 N. W. 325.)

Appeal — dismissal for nonprosecution — motion to vacate order.

From a judgment rendered before a justice of the peace of Pierce county defendant appeals. The justice fails to transmit the record on appeal to the clerk. Thereafter, by stipulation, the venue is changed to McHenry county, and later, on a written stipulation, the case was continued over a term of court there held. At the succeeding November, 1910, term, nearly one year after entry of the judgment appealed from, the case was set by the court on peremptory call for trial or final disposition for on or after December 5th, on which date the case was called for trial, with defendant and appellant defaulting in appearance, and not having appeared throughout that jury term then in session. On motion of plaintiff, made on the grounds that the appellant had wholly failed to prosecute his appeal and had failed to have the record on appeal certified by the justice to the district court, defendant's appeal was dismissed and judgment entered accordingly. Two days thereafter defendant moved to have the order and judgment vacated, and for an order requiring the justice to transmit the record, and for a continuance of the cause over the term, which motion was denied. No affidavit of merit or pro-

posed pleading accompanied the motion, nor are appellant's defaults in appearance in any way excused. *Held:*

(1) That the court had authority to dismiss said appeal for nonprosecution by the appellant, because of his defaults in appearance throughout the term and at the time so set for final disposition of the case by trial or otherwise.

(2) That defendant, in the motion to vacate and on this appeal, having challenged only the power of the court to dismiss the appeal, and not sought to excuse or explain his default by affidavit of merits, was entitled to no relief, and the motion was properly denied.

Opinion filed November 23, 1912. Rehearing denied January 2, 1913.

Appeal by defendant from a judgment of dismissal of the District Court for McHenry County, *Burr, J.*

Affirmed.

Statement by Goss, J. This action was first brought before a justice of the peace in Pierce county, and judgment was there, on the 31st day of December, 1909, rendered against the defendant and appellant. On January 10, 1910, the defendant and appellant perfected an appeal to the district court of Pierce county, and notice of appeal and undertaking were duly served and filed on January 10, 1910; and thereafter the statutory notice from the clerk was duly sent to said justice of the peace, requiring him to transmit the record in said action to the clerk of the said district court. The justice, however, failed to transmit the record, or any part thereof, although the fee for the transcript was duly paid. On February 28, 1910, the place of trial was by stipulation changed from Pierce to McHenry county, and the trial set for March 15, 1910, at Towner. Later the case was by stipulation continued to the May, 1910, term of said court. The court, however, ordered that no jury should be called for such term, and no demand for a jury appears to have been made. At the November, 1910, term of the court, the case was set on the peremptory call for on or after December 5, 1910, and on such date the case was called for disposition, and, no appearance being made by the defendant and appellant, and on motion of plaintiff's attorneys, the appeal from the justice court was dismissed, and the judgment of such justice affirmed, "for the reason that the appellant had wholly failed to prosecute his appeal, and for the reason that the appellant had wholly failed to have the record on

appeal certified by the justice of the peace to the district court." Two days thereafter, and on December 7, 1910, defendant and appellant moved to have such order vacated, and for an order requiring the justice to transmit the record to the said district court, and that the case thereafter be not tried, but continued over that term of court. This motion was based upon the files in the case and upon an affidavit setting out the facts as above stated. No affidavit of merits or proposed pleading accompanied the motion, which was denied, and the defendant and appellant appeals to this court.

C. D. Kelso, for appellant.

The proper steps for respondent, without the formal statutory notice, would have been to move for judgment upon the pleadings, or present his evidence and demand judgment. *Myers v. Mitchell*, 1 S. D. 249, 46 N. W. 245; *Keehl v. Schaller*, 1 S. D. 290, 46 N. W. 934.

Appellant's appeal from the justice court could not be dismissed for failure to have the record transmitted, as that is no part of his duties on appeal. *Haessly v. Thate*, 16 N. D. 403, 114 N. W. 311; *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860.

Kline & Funke, for respondent.

Goss, J. (after stating the facts as above). The court acquired jurisdiction by the filing of the notice of appeal and undertaking on appeal, after service thereof. Thereafter the parties stipulated a change of venue, and then stipulated the cause over one term, and it came on regularly for trial as one of the causes for trial at the regular jury term convening in November, 1910. The case was set on peremptory call for disposition by trial or otherwise, and thereafter, quoting from the order dismissing the appeal, was "duly called for trial and argument on December 5, 1910," with plaintiff appearing and defendant defaulting in appearance; whereupon, the appeal, because of appellant's default in appearance, on motion of plaintiff and respondent, was dismissed for want of prosecution, and for failure to have the record on appeal before the court.

It is unnecessary to pass upon the question of the failure of the justice to transmit the record, as the respondent was entitled to a dismissal of the appeal for want of prosecution or appearance by the ap-

pellant, defendant, at the time when the case was called for trial. As one ground of the motion was well taken, the judgment must be affirmed.

The appellant contends that the court was without power to dismiss the appeal, but that, instead, it should have tried the case and rendered judgment on trial. He cites no authorities, and we are satisfied none is available for this position, as the court had the same inherent power to dispose of the case by dismissal of the appeal as it did have to then entertain and proceed to a trial of the case upon the merits. Our statute, § 8510, contemplates the dismissal of appeals. Sec. 7012 authorizes a disposal of the case when reached on the trial calendar. With the power to dismiss, it was optional with the plaintiff and respondent whether he would take his relief by verdict and judgment and enforce its collection through district court process, or, instead, with defendant in default in appearance, to procure the dismissal of the appeal because thereof, thereby enabling him to realize on his judgment by execution out of the justice court thereafter. Had the court tried the case then, after it had been placed upon the peremptory call for disposition, summarily or on the merits, and entered its judgment on the verdict, or, if a jury had been waived by the plaintiff, on its findings, appellant would have had nothing of which to complain. He was in default throughout that term and when his case was disposed of. Without formal motion to vacate the order upon grounds showing excusing his default, he could not then be heard to question the validity of the judgment rendered on this motion, if within the power of the court to so dispose of it on default; and we can see no good reason why he should not be equally bound, under these circumstances, because the plaintiff elected to receive, and the court chose to grant, instead of a judgment on the merits, a judgment for dismissal of the appeal.

The motion of the defendant and appellant is for a vacation of the order dismissing the appeal, and is based upon the files and records in the case and the affidavit of appellant's attorney, which affidavit recites merely the record, and that the justice has failed to transmit his transcript. No attempt is made, by affidavit or otherwise, to explain appellant's default in appearance, nor is there any reason assigned therefor. He evidently assumed, then as now, that it was error to dismiss the appeal in the absence of the justice record. With his

motion for vacation of the order dismissing the appeal, he asks for an order requiring the justice to transmit the record, and that the cause go over the term to stand for trial at the next regular term of court after the filing in said district court of the justice's transcript on appeal. Judgment had been rendered against appellant in the justice court on December 31st, 1909. He had appealed, and by stipulation with opposing counsel the cause had gone over the May, 1910, term of the district court, and had been reached for trial at the succeeding term and disposed of approximately one year after the entry of the judgment appealed from in the justice court, without appellant causing the record on appeal to reach the appellate court; and as a part of the motion, the denial of which is appealed from, he asks for further delay to the effect that, largely, if not entirely, because of his defaults in appearance at the term, wholly unexcused, plaintiff and respondent shall lose the benefit of that term, and stand the consequent delay in final disposition of the case. As the matter of the vacation of the order for judgment after this default, under these circumstances, was a matter within the sound discretion of the trial court, its decision will not, except for manifest abuse, be disturbed. *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, and cases therein collated.

Appellant cites and relies upon *Myers v. Mitchell*, 1 S. D. 249, 46 N. W. 245, and *Keehl v. Schaller*, 1 S. D. 290, 46 N. W. 934, holding, under the South Dakota statute regulating appeals, that an appeal cannot be dismissed *without notice*. These decisions were based on § 6136 of the Compiled Laws, formerly in force in Dakota territory, and re-enacted as § 106 of the Justice's Code, Compiled Laws of South Dakota 1910. It is significant that our legislature has adopted most of the provisions regulating appeals from justice to district courts that were in force under territorial statutes, but has omitted that portion of § 6136 providing for dismissal *after notice* in case of failure to prosecute. Sec. 6136, Compiled Laws, in this particular, reads: "For failure to prosecute an appeal or unnecessary delay in bringing it to a hearing, the district court, *after notice*, may order the appeal dismissed." This is the provision passed upon by the South Dakota court in the cases cited. The right of appeal is conferred by statute, without which statute the right would not exist. It is the appeal which

transfers jurisdiction from the justice to district courts. With jurisdiction transferred under the statute, the district court has the same right of summary disposal over an appeal case that it has over an action originally begun therein, and with the dismissal of the appeal contemplated by statute, it may, in its discretion, upon proper grounds, exercise the power to dismiss. We do not regard said holdings as here applicable, our statute not requiring notice of motion during the term and after a cause has been set for trial on the peremptory call. Our terms of court are fixed by statute for times certain, thereby giving notice to litigants with business pending of the time of the court sittings. Under the practice prevailing in all trial courts, on the convening of the term causes are assigned for trial and final disposition. At such time no notice of motion to dismiss an appeal, or to set a cause for trial on peremptory call or for a day certain, or kindred matters of court routine, need be given. In the absence of good reason shown to the contrary, the trial court has inherent power to arrange causes for trial as suits its convenience, that it may expedite proceedings, keep the jury busy, and accomplish the most at the least expense to litigants and to the county furnishing the court machinery. With court in session, except for cause shown, appellant was in default in not attending court. *Manning v. Nelson*, 107 Iowa, 38, 77 N. W. 503, is to the effect that it is the duty of counsel to attend to matters pending in court, and that the act of the court in setting causes for trial or other proceedings is notice to all parties, and that the same applies to motions in such proceedings. To the same effect, see *Delaplaine v. Hitchcock*, 6 Hill, 14, the syllabus holding that "after a defendant has been brought into court, he is chargeable with knowledge of all subsequent steps taken in the cause down to and including the judgment, although he did not in fact appear, and had no actual knowledge on the subject." See also *Sharpe v. Fowler*, Litt. Sel. Cas. 446, from the opinion of which we quote: "The plaintiff was, and must be presumed to be, in court to attend to his cause while the court had power over it, *as they had during the same term*, to make any order therein." See also *Riley v. Wiley*, 3 Dana, 75, and *Butler v. Thompson*, 2 Fla. 14, from which we quote: "When a party is once brought into court, he is chargeable with whatever is done there in the suit in which he is a party, although he did not in fact appear, and had no actual knowledge on the subject."

See also *Goldberg v. Cohen*, 156 Ill. App. 344; *London Guarantee & Acci. Co. v. Mossness*, 108 Ill. App. 440; *Bostrom v. Alexander*, 138 Ill. App. 428. See also 28 Cyc. 8, that "in legal strictness, parties are bound to take notice of all motions made in court during the pendency of the action, *unless actual notice is required by statute* or by the court rules, or by some express direction of the court made in the cause, by decree, or otherwise." Under these authorities, although the defendant was in default, he is, in the absence of some excuse therefor, bound by the court's disposition of the case to the same extent as though he were present. The proceedings were in no wise *ex parte*, but, instead, entirely regular under § 7012, Rev. Codes 1905, and stand with appellant's default wholly unexcused.

We are also familiar with the procedure under California holdings (see *Rabin v. Pierce*, 10 Cal. App. 734, 103 Pac. 771, and cases therein cited) which, under their statute, hold the right to dismiss for failure to prosecute applies only to the right to dismiss because of failure to comply with technicalities of procedure in perfecting the appeal, as well as *Chenowith v. Keenan*, 61 W. Va. 108, 55 S. E. 991, in line with the South Dakota holdings. The statutes underlying all these decisions require service of notice before an appeal can be dismissed. Ours does not, and hence these decisions are not applicable. Besides, our statute, § 8510, provides that a certified copy of the order dismissing the appeal shall be filed in the justice court in which the judgment appealed from was rendered, and that thereafter the judgment is enforced, after dismissal of appeal, by execution out of the justice court. In West Virginia it appears from the opinion in the case cited, that no such remand to the justice is provided by their statute.

Appellant contends that the district court has no power to dismiss an appeal; that he had the right to rely on plaintiff making proof of his case in district court, and the right to take advantage of any defect in or failure of any proof attempted to be so made by plaintiff; and had a right to have the appellate court reassess any damages. This overlooks the fact that he has already had his day in court at the former trial, and that the judgment against him still exists pending the appeal, §§ 8503-8510, and imports the same verity that obtains to any judgment until superseded; and the dismissal of the appeal leaves

intact and in force the judgment in justice court appealed from. Hence no necessity for reassessment of damages or resubmission of proof already once submitted and the basis for one judgment still existing.

Appellant cites *Haessly v. Thate*, 16 N. D. 403, 114 N. W. 311, as authority to the effect that a district court cannot dismiss an appeal except one taken on questions of law alone, under the provisions of § 8501, Rev. Codes 1905. This case does not sustain this broad contention that a district court has no general authority to dismiss an appeal taken generally. It is authority for the proposition that an appeal on law and fact cannot be dismissed for the sole reason that the justice has failed to transmit his record. This is far from denying the right to dismiss an appeal upon other grounds. For example, those now before us, where appellant has defaulted in appearance in the district court during the jury term at which he must have known his cause was for determination. Had appellant been present at the call of the calendar and the placing of cases on the peremptory call, or at the time the action was thereafter reached for disposition, and then requested an order directed to the justice for the transmission of the record, or had done any other act to show his good faith or desire for a trial upon the merits, instead of being wholly in default throughout the term, we would now have a different case before us. The appeal was taken upon both law and fact, and had appellant been present ready for trial when the case was reached upon the peremptory call, it is probable that the justice's record could have been dispensed with, issues there formulated and tried, as is the common practice in trial courts where parties really desire to litigate on the merits. Assuming that no burden rested upon appellant to have the justice record in the district court of McHenry county, it does not follow that no burden rested upon him to be there present and ready for trial when the cause should be called for disposition. If he saw fit to disregard his own rights and speculate on what action the court would take concerning his case, the opposing party, recovering judgment below, from which appellant by the appeal seeks to relieve himself, should not be prejudiced nor longer delayed by the failure of appellant to appear. To hold otherwise would be to penalize the diligent party to an appeal because of the shortcomings, carelessness, or wilful default of an appellant,

and allow such party in default to benefit by his own laches; and such a doctrine we cannot sanction. Defendant's default in appearance was alone sufficient to warrant the action taken by the trial court. Judgments cannot be set aside on mere irregularities of procedure arising from unexplained and unexcused default, where the result would have been the same in any event. Appellant cannot be heard, in the face of his defaults, to urge prejudice arising from the mere manner of the awarding of judgment against him because of his nonappearance. Such would necessarily be our holding upon an action brought originally in the district court on which judgment had been entered by default upon nonappearance of the adverse party at the time set and when reached for trial on the peremptory call. The fact that this action reached the court by an appeal should in no wise affect the application of the rule.

Our conclusion is that the district court had jurisdiction of persons and subject-matter by virtue of the notice of appeal and undertaking on appeal and record thereof transmitted to it from the district court of Pierce county, as well as by the written stipulations of the parties on file; it was empowered to set the case for trial and final disposition as it did; that an abundance of time, more than a week, elapsed from the convening of the term until the case was reached for such purposes, during which time this appellant wholly defaulted in appearance, as likewise he did when the case was called for trial and final disposition; the court had power to try the cause had the defendant been present, and necessarily had the same authority with the defendant in default; the district court has power under such circumstances to dismiss an appeal for want of prosecution by the appellant, and the exercise thereof herein is something of which the party so in default cannot be heard to complain, in the absence of an affidavit of merit excusing his default and invoking the discretion of the court to be relieved therefrom as a matter of favor and discretion, and not of strict legal right.

Accordingly the judgment is ordered affirmed, with costs.

BRUCE, J. (dissenting). I cannot concur in the majority opinion. In my judgment the filing of the notice of the appeal and the undertaking gave the district court jurisdiction of this case, and under our statute it was no more incumbent upon the defendant to see that the

justice of the peace performed his duty and transmitted the record than it was upon the plaintiff himself. The only particular in which this case differs from the case of *Haessly v. Thate*, 16 N. D. 403, 114 N. W. 311, is that to be found in the fact that the defendant was absent at the time the case was called for trial. This, however, does not alter the rule. The defendant had perfected his appeal in so far as he was concerned, and the justice alone was negligent. Defendant did not fail to *prosecute* his appeal, and the appeal should not have been dismissed for this reason. He had done his part in removing or appealing the case for trial *de novo* to the district court, and on that trial *de novo* it was incumbent upon the plaintiff to proceed and to prove his case. Under our statute, § 8507, Rev. Codes 1905, either party may obtain an order for the transmission of the record, and since plaintiff did not ask for the order, there is no reason why it should not have been allowed to the defendant. The case is, as we before intimated, practically settled by the decision in *Haessly v. Thate*, *supra*. In addition thereto the following statutes and decisions are more or less pertinent: Section 7012, 8509, 8500, 8507 and 7326, Rev. Codes 1905; *Myers v. Mitchell*, 1 S. D. 249, 46 N. W. 245; *Keehl v. Schaller*, 1 S. D. 290, 46 N. W. 934; *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860; *Rabin v. Pierce*, 10 Cal. App. 734, 103 Pac. 771; *Alexander v. Municipal Ct.* 2 Cal. (Unrep.) 390, 4 Pac. 961; *Chenowith v. Keenan*, 61 W. Va. 108, 55 S. E. 991; *Morgan v. Zimmer*, 120 App. Div. 672, 105 N. Y. Supp. 914; *Clark v. Harris*, — Tex. Civ. App. —, 129 S. W. 202.

I am authorized to state that FISK, J., concurs in this dissent.

McVEETY v. HARVEY MERCANTILE COMPANY,
Limited, et al.

(139 N. W. 586.)

Vendor and purchaser — contract — performance — conveyance by third party.

Plaintiff in writing contracted to sell and convey by his warranty deed, 1,200 acres of land to defendant corporation, as a purchaser. He sues to re-

Note.—The general rule that a vendor of land, in order to enforce any rights

cover damages for refusal and neglect of defendants to perform their part of the contract. The answer denies that plaintiff was ever able to perform under his contract. On trial the proof disclosed that plaintiff never owned any of the land, nor had he any interest therein, but that he had contracted to personally sell the same, relying upon written permission from the owner that he might sell during a period which had expired, but had been verbally extended, to expire at the end of the time fixed in the written contract between plaintiff and defendants for its performance. The owner executed for delivery his deed of 960 acres, and assigned contracts for deeds for 160 acres, but inadvertently omitted to deed the remaining 80 acres of the 1,200-acre tract agreed by contract to be conveyed. The deed was sufficient to convey title to the land designated therein from the owner, Ross, grantor, to defendant company as grantee. This deed, with assignments of contracts to the 160 acres, was deposited at the place designated for deposit in the written contract between McVeety and defendants, and within the time limited for performance of said contract; this as a tender of performance by McVeety, who then notified defendants that he was able and ready to convey and fully perform his part of his contract upon payment by them of the purchase price, consisting of, in part, a bill of sale of a stock of goods, deeds of some town lots owned by Sayre, and a cash balance. Defendants refused to accept the deeds, convey, or pay the purchase price, on the ground that the deed deposited did not convey fee title to the omitted 80 acres and the 160 acres covered by contracts assigned, such refusal having been made on the last day of the fifteen-day period for the performance of the contract. Plaintiff asserts that defendants were in default in a condition precedent to the right to require a deed, in that an inventory of the stock of store goods, the inventory price of which was to constitute part of the purchase price of the lands, had not been theretofore made as provided in the contract; and that a sufficient proof of ability of McVeety to convey had been made, while defendants had been proven to have been in default; and that defendants cannot be heard to claim the right to a deed from McVeety, instead of from Ross, owner, in the performance of the contract, because defendants did not specifically object on that ground to the sufficient title offered them by the deed from the owner direct to the defendant company. Plaintiff seeks to recover the difference between what the landowner, Ross, would have been paid for the land, \$38,000, and the \$66,000 contract selling price to defendants, and on the trial recovered a verdict for \$13,000. *Held:*

1. That to have performed his contract according to its terms, defendant must have been able to convey by his own warranty deed the land he has contracted to so convey, under the provisions of § 5401, Rev. Codes, 1905, pro-

under the contract of sale, must himself be in a situation to give such title as he has undertaken to give, is indisputably established, as shown by a note in 3 L.R.A.(N.S.) 103, with which the holding in the above case is in harmony.

viding that "an agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass title to the property."

Vendor and purchaser — offer of performance — conditions.

2. That under § 5253, Rev. Codes, 1905, providing that "an offer of performance must be free from any conditions which the creditor is not bound on his part to perform," plaintiff has never offered a performance of his contract to convey, even granting the deed had been sufficient to convey title to the full tract of land covered by the contract; and as the tender of the deed of the third-party owner could not constitute a compliance with the contract calling for a deed of McVeety to defendants, proof of the offer of the third party to so convey all said tract is not sufficient to constitute proof of McVeety's ability to perform his contract with defendants.

Vendor and purchaser — contract — covenants of warranty.

3. The right to the covenants of warranty by deed from the seller is a valuable property right in the purchaser that must be given as required by the contract, unless expressly waived by the purchaser.

Vendor and purchaser — refusal to perform — waiver.

4. Defendants, by merely refusing to perform upon the tender of performance here offered by Ross, did not, by failing to demand the deed of McVeety, instead of the one tendered, waive the right contracted for, that McVeety should deed as grantor, to them as grantee, and that the title should come to the defendant company through McVeety.

Vendor and purchaser — contract — ability to perform contract.

5. Proof that a buyer of real estate would have received title from a third person to land covered by the contract is not proof of ability in the seller to perform his contract to convey by his warranty deed to his purchaser

Vendor and purchaser — contract — breach — damages — ability of vendor to perform.

6. Without proof of ability in a seller of real estate to convey to his purchaser in accordance with his contract with such purchaser, there can be no proof of detriment or injury occasioned the seller by a refusal of his purchaser to perform the contract. Proof of the seller's ability to perform lies at the base of any right of his to recover, and is a condition precedent to any right in him to recover. Without proof of such ability, no cause of action is established.

Vendor and purchaser — breach of contract — action by vendor — default in condition precedent.

7. With no cause of action established as in plaintiff, because no ability in him to perform the contract has been shown, proof that the defendants were in default in the performance of any act precedent to the delivery of the deeds and payment of the consideration therefor is immaterial, as it can neither

cure nor affect plaintiff's inability to perform the contract at any time during the life thereof.

Judgment — judgment notwithstanding the verdict.

8. The evidence precludes any right of plaintiff to recover, and the motion of defendants for judgment of dismissal of this action notwithstanding the verdict should have been granted.

Opinion filed January 2, 1913.

From a judgment for plaintiff, entered in the District Court for Wells County, *Coffey, J.*, defendants appeal.

Reversed, and the action is ordered dismissed on the merits, with costs to defendants.

John O. Hanchett, for appellants.

If plaintiff can recover in this action, such recovery must be based upon the written contract pleaded. *Johnson v. Kindred State Bank*, 12 N. D. 336, 96 N. W. 588; 20 Am. Dig. Century ed. cols. 2464-2471, and cases cited. Rev. Codes, Sec. 5333; *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729; *National German-American Bank v. Lang*, 2 N. D. 66, 49 N. W. 414; *Schmitz v. Hawkeye Gold Min. Co.* 8 S. D. 544, 67 N. W. 618; *Northwestern Fuel Co. v. Bruns*, 1 N. D. 137, 45 N. W. 699.

The contract is clear and certain, and language thereof alone must govern as to its interpretation. Rev. Codes, Sec. 5342.

Extrinsic evidence not admissible to explain. *Tourtelot v. Whithead*, 9 N. D. 467, 84 N. W. 8, 20 Am. Dig. Century ed. col. 2472, and cases cited; *Grant v. King*, 117 Minn. 54, 134 N. W. 291; *Weitzel v. Leyson*, 23 S. D. 367, 121 N. W. 868.

Where contract provides for the delivery of a warranty deed, it means deed of the person so contracting. *Royal v. Dennison* — Cal. —, 38 Pac. 39; *Crabtree v. Levings*, 53 Ill. 526; *Steiner v. Zwickey*, 41 Minn. 448, 43 N. W. 376; *George v. Conhaim*, 38 Minn. 338, 37 N. W. 791; *Wietzel v. Leyson*, 23 S. D. 367, 121 N. W. 868; *Buswell v. O. W. Kerr Co.* 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837.

The deed of a third party tendered under such a contract not sufficient. *Royal v. Dennison* — Cal. —, 38 Pac. 39.

One having an equitable estate merely, under an executory con-

tract, may offer premises for sale, without waiting to obtain deed. *Townshend v. Goodfellow*, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056.

Plaintiff never at any time had title to the land, and, on his own showing, cannot recover damages. *Gray v. Smith*, 28 C. C. A. 168, 48 U. S. App. 581, 83 Fed. 825; *Wells, F. & Co. v. Page*, 48 Or. 74, 3 L.R.A.(N.S.) 103, 82 Pac. 856; *Weitzel v. Leyson*, 23 S. D. 367, 121 N. W. 868.

Under such a contract, good legal and equitable title to the lands, free from all defects, must be tendered. *Turner v. McDonald*, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; *McCroskey v. Ladd*, — Cal. —, 28 Pac. 216.

Equitable title alone not sufficient. *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583.

Witnesses cannot testify to conclusions or mere opinions as to title. *Smith v. Northern P. R. Co.* 3 N. D. 561, 58 N. W. 345.

To maintain action for breach of contract, plaintiff must perform, or offer to perform, in order to put defendant in default, unless defendant has positively refused to perform on his part. *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037; *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94.

Time is of the essence of a contract only when so expressly stated therein. Rev. Codes, Sec. 5362.

A principal has notice of all facts known by his agent in the line of his duty, or within scope of his powers and employment. 40 Am. Dig. Century ed. col. 1521, and cases cited. *Vawter v. Bacon*, 89 Ind. 565; 40 Am. Dig. Century ed. col. 1527.

The measure of damages for breach of a contract to purchase lands is the excess of the contract price over the value of the lands, at the time of such breach. 48 Am. Dig. Century ed. col. 1357, and cases cited; Rev. Codes, Sec. 6569. *Tinsley v. Dowell*, 87 Tex. 23, 26 S. W. 946.

Value or damages must be fixed as of time of breach. *Citizens Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266.

Answer, by way of general denial, in action to recover damages for breach of contract to convey lands, puts in issue the amount of plain-

tiff's damages. *German-American Bank v. White*, 38 Minn. 471, 38 N. W. 361.

Under such general denial, proof of any fact tending to disprove plaintiff's damages or claim permissible. *Bliss*, Code Pl. 3d ed. Secs. 327-329; *Plano Mfg. Co. v. Daley*, 6 N. D. 334, 70 N. W. 277.

In such case, all facts, either expressly or impliedly averred, are put in issue by general denial. 31 Cyc. 195; *Bellinger v. Craigie*, 31 Barb. 534.

Pollock & Pollock, and *Turner & Murphy*, for respondent.

A party to an obligation can require performance thereof by another party, only when he has performed, or offered to perform, all conditions precedent, imposed upon him by the contract, and also be able and offer to perform all concurrent conditions imposed unless the other party has previously refused to perform, on his part. *Grant v. Johnson*, 5 N. Y. 247.

Where nonperformance is caused by defendant, plaintiff not bound to plead performance, or readiness to perform. Pleading the facts constituting his excuse in such case sufficient. *Foster v. Leininger*, 33 Ind. App. 669, 72 N. E. 164; *Estill v. Jenkins*, 4 Dana, 75; *Schreiber v. Butler*, 84 Ind. 576; *Jennings v. Shertz*, 45 Ind. App. 120, 88 N. E. 729; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381; *Maguire v. Halsted*, 18 App. Div. 228, 45 N. Y. Supp. 783; *Gould v. Brown*, 6 Ohio St. 538; *Rice v. Sims*, 2 Bail. L. 82; 11 Cent. Dig. Contracts, Sec. 1217.

It is only where plaintiff, by the contract, is required to do the first act, that he must plead offer to perform such act. 9 Cyc. 724, and cases cited.

Where performance excused by act or refusal of other party. *Rev. Codes*, Sec. 5268. 9 Cyc. 724-761; *Gray v. Smith*, 28 C. C. A. 168, 48 U. S. App. 581, 83 Fed. 824; *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938; *DeLoach v. Smith*, 83 Ga. 665, 10 S. E. 436; *Armstrong v. Andrews*, 109 Mich. 537, 67 N. W. 567; *Ferree v. Wilson*, 46 N. Y. S. R. 672, 19 N. Y. Supp. 209; *Bond v. Carpenter*, 15 R. I. 440, 8 Atl. 539; *Tinney v. Ashley*, 15 Pick. 546, 26 Am. Dec. 620.

Tender of deed of third person, to whom party making tender had conveyed the property which he agreed to exchange, will place other

party in default, if he refuses to accept such deed. *Royal v. Dennison*, 109 Cal. 558, 42 Pac. 39; *Rev. Codes*, Sec. 5260; *McKinney v. Bode*, 32 Minn. 228, 20 N. W. 94; *White & S. Townsite Co. v. J. Neils Lumber Co.* 100 Minn. 16, 110 N. W. 371; *Wilder v. Haughey*, 21 Minn. 101; *Haaven v. Hoaas*, 60 Minn. 313, 62 N. W. 110; *Hastay v. Bonness*, 84 Minn. 120, 86 N. W. 896; *Gilbert v. McDonald*, 94 Minn. 289, 110 Am. St. Rep. 368, 102 N. W. 712; *Nicholson v. Congdon*, 95 Minn. 188, 103 N. W. 1034.

Demand is unnecessary where it is shown that such demand would have been futile. "The law neither does nor requires useless acts." *Rev. Codes*, Sec. 6679; *Beiseker v. Amberson*, 17 N. D. 215; 116 N. W. 94; *Greenwood v. Hoyt*, 41 Minn. 381, 43 N. W. 8; *Rev. Codes*, Secs. 5255-5269, 5219; *Eames v. Haver*, 111 Cal. 401, 43 Pac. 1120.

If performance of an obligation is prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained, if performed by both parties. *Masterton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; *Bush v. Baltimore & C. Constr. Co.* 88 Md. 674, 41 Atl. 1092; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Gardner v. Armstrong*, 31 Mo. 535; *Morrison v. Wright*, 7 Port. (Ala.) 67; *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W. 123; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, 14 L. ed. 157.

The question of insufficiency of the evidence is limited to points and grounds brought to the attention of the trial court. *Schmidt v. Beiseker*, 19 N. D. 35, 120 N. W. 1096.

Assignments of error not discussed in brief, nor presented in argument, will be deemed abandoned. *Foster County Implement Co. v. Smith*, 17 N. D. 178, 115 N. W. 663; *Kelly v. Pierce*, 16 N. D. 234, 12 L.R.A.(N.S.) 180, 112 N. W. 995; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531.

Goss, J. This action was brought to recover damages for alleged default of the defendant in fulfilment of a certain contract to purchase lands. A verdict of \$13,000 was obtained against defendants, who appeal. The contract reads:

"This agreement made and entered into in triplicate this 27th day of May, 1910, by and between J. H. McVeety, party of the first part, and the Harvey Mercantile Company, a corporation, and A. J. Sayre,

acting by and through L. P. Strong, attorney in fact, party of the second part,

"Witnesseth: That the said parties have agreed and do hereby agree to make a sale and exchange of property as follows, *viz.*: The said party of the first part agrees to sell and convey to the Harvey Mercantile Company, one of the said parties of the second part, *by good and sufficient warranty deed free from all encumbrances*, 1,200 acres of land in the county of Clay, in the state of Minnesota, at the price of \$55 per acre, amounting to \$66,000, to be paid for by the parties of the second part in the manner hereinafter specified; which said land is more particularly described as follows: [with description] known as the D. C. Ross land."

"The parties of the second part agree to take and purchase the above-described land from the party of the first part at the price above mentioned, and to pay therefor as follows, *viz.*: The said A. J. Sayre, one of the said parties of the second part, agrees to sell and convey to said first party, by good and sufficient warranty deed, free from all encumbrance, the store building and lots in the city of Harvey, North Dakota, now occupied by the said Harvey Mercantile Company, at the agreed price of \$18,000, which said first party agrees to take at said price as a payment upon the sale of said land; which said lots and store building are more particularly described as follows: [with description given] and the store building thereon."

"As a further payment to the said first party for said land the said Harvey Mercantile Company, one of the parties of the second part, agrees to sell and transfer to said first party, free from all encumbrance, its stock of goods and merchandise now situated in the said store building on the lots above described:" (with the particular description of the stock transferred and providing for an inventory by parties named to determine the value of said goods.

"And the said Harvey Mercantile Company, party of the second part, agrees to sell and transfer to the said party of the first part, free from all encumbrances, and the said party of the first part agrees to take *as a payment on the sale of said land* all of the fixtures in said store, except the fixtures in the hardware department, the same to be inventoried and taken at the inventory price."

"That the balance of the purchase price of said land shall be paid

to said party of the first part in cash by the said Harvey Mercantile Company, party of the second part, *after the said inventory of stock and fixtures has been made and completed, and at the time the deeds are delivered and transfer made.*"

"It is agreed that said inventory is to be made, abstracts of title procured, deeds, and bills of sale prepared and executed in accordance with the terms of this contract, *and the deal closed within fifteen days from this date*; said deal to be closed, and deeds, abstracts, and bill of sale delivered at the Bank of Harvey in the city of Harvey, Wells county, North Dakota. In case the said lands shall have loans or encumbrances thereon which the parties of the second part desire to assume, *they may do so and the amounts owing thereon deducted from the purchase price of such land.*"

The complaint exhibiting the foregoing contract as a part thereof pleads the entering into this agreement in writing, alleging that "the plaintiff entered into an agreement in writing with the defendants, under and by the terms of which the plaintiff, as party of the first part, and the said defendants, as parties of the second part, contracted and agreed to make a sale and exchange" of the property mentioned in the contract. "That the said plaintiff agreed to sell and convey to said defendant Harvey Mercantile Company, *by good and sufficient warranty deed, free from all encumbrance, 1,200 acres of land,*" and corresponding to the description thereof in the contract. "That the defendants agreed to take and purchase the above-described land from the plaintiff at the price mentioned, and to pay therefor as follows, to wit: The said defendant Sayre agreed to sell and convey to plaintiff by good and sufficient warranty deed, free from all encumbrances, the store building and lots in the city of Harvey at the agreed price of \$18,000, which plaintiff agreed to take at said price as a payment upon the sale of said land."

"As a further payment to the plaintiff for said land the said Mercantile Company agreed to sell and transfer to the plaintiff, free of all encumbrance, its stock of goods and merchandise then situated in the store building on the lots above described." Then follows a recitation of the averments of the contract concerning the inventory and the ascertainment of the price of the stock of goods to be so taken in exchange and as a part payment upon said land. "It was further stipu-

lated and provided in said written agreement that the balance of the purchase price of said lands should be paid to the defendant in cash by said defendant Harvey Mercantile Company, after the said inventory of stock and fixtures had been made and completed, and at the time the deeds were delivered and transfer made." "It was further, in said written contract and agreement, specified and agreed that said inventory should be made, abstracts of title procured, deeds and bills of sale prepared and executed, in accordance with the terms of said written contract and agreement, and the deal closed within fifteen days from said 27th day of May, 1910; and that said deal be closed and deeds, abstracts and bill of sale delivered at the Bank of Harvey, in the city of Harvey, North Dakota; and it was further therein agreed and specified that in case the said lands should have loans or encumbrances thereon, which the defendants desired to assume, they might do so, and the amounts owing thereon deducted from the purchase price of said lands." "That the plaintiff was at all times *after the taking of said contract, and until the expiration of said fifteen-day period therein specified, able, ready, and willing to perform all the conditions of said contract* as above set forth on his part to be done and performed, and on the 6th, 7th, 8th, 9th, 10th, and 11th days of June, 1910, offered so to do, and that at each and every such time he requested and demanded of the defendants that they perform the conditions and provisions of said contract and agreement on their part to be performed." "That the defendants wholly failed, neglected, and refused to perform the conditions of said contract and agreement as hereinbefore alleged upon their part to be done and performed, and wholly failed, neglected, and refused so to do, and wholly failed, neglected, and refused to convey the said real estate agreed by them to be conveyed, and wholly failed, neglected, and refused to transfer and deliver to the plaintiff the personal property or any part thereof, and wholly failed, neglected, and refused to inventory the same or any part thereof, and wholly failed, neglected, and refused to pay over to the plaintiff the said money or any part thereof, to the damage of the plaintiff in the sum of \$35,000." Then follows a demand for judgment for \$35,000. We have italicized parts of the contract and complaint to be noticed hereafter. The complaint is thus set out in detail to show that the same follows the contract, and is based upon an

alleged breach of a contract of purchase and sale of real property between the parties to this action, McVeety, plaintiff, and the Mercantile Company, and Sayre, as defendants. In no sense can the contract be said to be for commissions, or a real estate brokerage contract, but instead is a contract of sale, whereby McVeety agreed to convey, by his deed of warranty, good and sufficient title to the particular 1,200 acres of land, described, to the Mercantile Company as grantee, upon the payment by the said grantee to such seller and grantor at the bank designated, the equivalent of \$66,000, to be paid by deed of the business property from Sayre to McVeety, and a bill of sale by the Mercantile Company of the stock of goods from it to McVeety, and a payment of a cash balance. The fifteen days within which the "deal was to be closed" dated from May 27th, expiring Saturday night, June 11, 1910.

The separate answers of the two defendants deny the legality of the alleged contract, on grounds stated; and, "further answering said complaint, defendant alleges that the said McVeety was never at any time prior to the commencement of this action *able to comply with the terms and conditions of said contract on his part*, and never at any time prior to the commencement of this action *offered to comply with the same*, and has never at any time *tendered or offered to deliver to the defendants warranty deeds to the several tracts of land, free from encumbrances as specified in said contract;*" together with a general denial of the allegations of the complaint. The issue presented is one of the readiness and ability of the plaintiff to perform, coupled with the further question, if necessary to consider the same, of whether, granting that readiness and ability to perform are established, defendants defaulted in or breached the contract while the plaintiff was so ready, able, and willing to, and endeavoring to, perform its terms, conceding that its nonfulfilment would occasion plaintiff detriment for which he may recover damages. A question of the measure of damages is also raised for disposal, provided a cause of action for damages exists to plaintiff.

As bearing upon the performance of the contract and the ability of the plaintiff and alleged defaults of the defendants in their performance, it is necessary at this time to give a synopsis of the testimony pertinent thereto; and, as this case was tried to a jury and a recovery

had, we must take every reasonable intendment as against the defendants, and, on all disputed questions of fact, adopt the testimony on the plaintiff's side of the case as controlling on the facts.

The officers and principal shareholders of the Harvey Mercantile Company, with the exception of its manager, Mr. Phillips, were then residents of the Canadian Northwest. The mercantile business was to be continued pending the transfer. Previous to the entering into the contract, the defendants had knowledge that the Minnesota land to be transferred was owned by Ross, and not by McVeety. Defendants understood McVeety had some deal on for the purchase of the land he was selling, and assumed he could comply with the terms of the contract, and evidently all parties to the contract entered into it with good faith and with intent to comply with its provisions. In fact, McVeety did not own any part of the tract he contracted to sell, and has never at any time had title thereto or any interest therein. His authority to sell is contained solely in the following letters from the owner of the land, coupled with an oral extension thereafter. The letters are:

Minneapolis, Minn., March 8, 1910.

J. H. McVeety,
Harvey, N. D.

Dear Sir:-

Your letter of the 2d was received by me to-day, relating to my lands in Clay county. I have not made any deal regarding the sale of the same yet, and would be pleased to know whether this party who you refer to could handle it. [Then comes a description of the land by tracts.] As you stated in your letter, I think I did mention a \$40 price to you, but if it would be sold on a cash basis there would be \$5 an acre commission in it for you. "Write me at the Vendome Hotel as to whether you can handle it, or if you wish me to meet you at any place you can state where." "I will say at present that I will not list these lands with anyone, but if you have a proposition to offer I will consider it upon my return from the above places. If, however, there is anything pressing, you can wire me at Chicago, in care of Kaiserhof Hotel.

Yours truly,
D. C. Ross.

No answer to this letter is in evidence if any was made. Subsequently the following letter was received by plaintiff:

Fargo, North Dakota, May 11, 1911.

J. H. McVeety,
Harvey, N. D.

Dear Sir:—

I will give you until May 21, 1910, to close up the sale of all my land in Clay county, Minnesota, under the terms of my letter of March 8, 1910, said terms being \$35 per acre net cash to me.

(Signed) D. C. Ross.

By an oral understanding subsequently had between Ross and plaintiff, the privilege to sell mentioned in these letters was extended up to and including June 11, 1910, under the same terms. The next step in proceedings is the contract for purchase and sale, of date of May 27, 1910, providing for the closing of the deal within fifteen days from that date, or on or before June 11th following. On May 28th, Ross executed his warranty deed, duly acknowledged, in proper form, running to the Harvey Mercantile Company as grantee, describing and conveying 960 acres of said 1,200 acre tract, of which total tract the description of 80 acres was inadvertently omitted. Another 160 acres of the tract was held by Ross on state land certificates issued by the state of Minnesota and assigned to him, upon which there was a balance due to the state of \$900, and for which land no patent or deed had been issued by the state, as the contracts had not been paid up. These four contracts for a total of 160 acres of the land described in the contract of sale were assigned by Ross to the Harvey Mercantile Company, and forwarded May 2, with the deed covering the 960 acre tract, to the First National Bank of Harvey, with a letter of instructions of said date, the material parts of which letter read: "We send you herewith the following papers: Warranty deed from Donald C. Ross to the Harvey Mercantile Company for the following described real estate in Clay county, Minnesota: [Describing 960 acres of it] also Minnesota commissioners certificates internal improvement lands covering the northeast quarter of 22-138-48, Clay county, Minnesota,

24 N. D.—17.

said certificates being assigned by D. C. Ross to the Harvey Mercantile Company."

"These papers are to be presented by you for us at the bank of Harvey, and delivered to said bank for the said Harvey Mercantile Company, or directly to the officers of the said bank, at said bank, upon the payment to you for remittance to us of \$38,061.10."

"Kindly present these papers at the bank upon receipt, but retain possession of the same until payment of the above amount is made to you for remittance to us. You are authorized to retain these papers for the purpose above indicated, until the close of business on the 11th instant, *after which, if the same are not taken up prior to that time, they are to be returned to us.*"

"These papers affect a land deal of considerable importance, in which James H. McVeety of your city is interested, and no doubt he will see you about it. We anticipate that after you present these papers at the bank, and they know that you have them subject to delivery at any time within the period above mentioned, they will inform you whenever they are ready to close the deal and pay the money. You can, of course, make your arrangements with said bank as to the details."

"These papers are sent to you for the accommodation of Mr. McVeety, and your compensation, including exchange, should be paid by him, and he will pay the same upon request from you so to do. Kindly acknowledge receipt." Signed by S. S. Lyons, as cashier.

On the following Monday, June 6th, these papers were presented by the First National Bank to the Bank of Harvey, mentioned in the contract, where they remained a week until sometime during the day of June 14th, when they were returned pursuant to instructions under which they were sent to Harvey. With the deed and assignments were abstracts of title to the various tracts which were taken from the bank by Phillips, the representative of the defendant company, for inspection, and were by him forwarded to his attorney at Fessenden for his examination and advice as to the record title of the land, and were returned with letters of criticism on the titles of various tracts under date of June 10th; and the next day, Saturday, June 11th, Phillips returned the abstracts and notified the cashier of the Bank of Harvey that he refused to accept the papers, as they were unsatisfac-

tory or insufficient, according to the testimony of such cashier; and, according to the testimony of Mr. Phillips, he notified said cashier that "the deeds were insufficient and the land encumbered with mortgages and taxes, and we couldn't accept them as they were." And at that time an examination of the deed was made by Mr. Phillips, who appeared at the bank again the following Monday morning. Concerning what transpired, Mr. Phillips testified: "He still had the papers there at that time. I asked him if he still had the deed, and he said he had, and I asked him if I could take it a moment, and he said, 'Yes'; and I did take the deed, and he was there with the president of the bank. I had the contract there. I called their attention to the fact that 80 acres was omitted on the deed and the deed called for encumbrances, and I showed them the terms of the contract and told them this description isn't in the deed at all, and called their attention to the encumbrances, and they noticed that and also went on to say that the land was encumbered with a ditch lien and taxes. I had learned that from the opinions on the abstract. As to what I said about the condition of the title to the northeast quarter of section 22, I called their attention that there were four certificates, 40 acres each, called internal improvement certificates, and so marked it on the contract at the time and took a memorandum of it. That is I called their attention to the fact that there were those certificates, instead of the deed. That was while Mr. Blanch (cashier of the Bank of Harvey) still had those papers there. If those papers, deeds, and transfers had been in accordance with the contract, and no defects of title, I was at that time ready, willing, and able to go through with this contract. It would simply have involved a delay in getting started, simply been ready to start, but it brought things down to a point where we would have been ready to start the inventory. I was still anxious to go through with the deal."

Phillips also testifies to having called McVeety up by 'phone Saturday afternoon, June 11th, and told him over the 'phone: "We have rejected your tender, because your deeds are insufficient and the lands are encumbered with mortgages and taxes. I know his voice and I could not be mistaken." This telephone conversation is denied entirely by McVeety, and, under the findings of the jury, it must be taken as never occurring. Concerning the matters transpiring Monday

morning in the Bank of Harvey Blanch, testifies: "I had some conversation with him after that (Saturday) I think on the following Monday, which would be the 13th in the morning. At that time he said the papers were incomplete, and the land was encumbered with mortgages and taxes, and also called my attention to the fact of an omission of 80 acres in the description of the deed. He did not mention any of those things to me prior to the 13th of June to the best of my recollection." "When he was there on Monday morning he pointed out some defects in the papers. At that time he called my attention to the fact that there was 80 acres omitted from the deed. At that time he had the contract there. Compared it so I could see that there was 80 acres omitted. My attention was called to the fact at that time that 80 acres was omitted from the deed. Phillips also called my attention to the fact that there was no deed to one tract, but only those state land certificates,—they were there,—and he called my attention to that fact. He also called my attention to the fact that the lands were covered by mortgages and encumbrances. To the best of my recollection he did not call my attention to the matter of a ditch lien on one quarter. This afternoon is the first time I heard about that." "When I returned the deeds on Monday I think I returned them to the assistant cashier of the First National Bank. When they were returned I informed him that the tender was rejected, but I don't know whether I told him any specific reason or not. If he asked me I would have told him all about it, all I knew."

McVeety testifies concerning this particular matter: "I never did pay up these mortgages (on these lands aggregating some \$4,400). I never procured or tendered satisfactions of these mortgages, and I did not have them there at the bank so they could be closed out as the same transaction, not except they accepted them subject to these liens. It would have taken a few days to clear them off. The abstract showed unpaid taxes on this land. I did nothing about having those paid off. As to whether one 80-acre tract was omitted entirely from the deed, I did not know that it was. That is what I have been told. If it was, that was not intentional. There was never any other or further tender or offer to comply with this contract after this 11th day of June. The instructions were to return the papers, and they were returned on the following Monday."

Ross testifies that on June 23d, following the return of the papers, he transferred a half section of the 1,200 acres. "I never conveyed, by warranty deed or otherwise, the legal title to these lands or any of them to the plaintiff McVeety. The time within which *he was given the right to sell the lands in question under these exhibits has now expired.*" "As to my extending the time in which plaintiff might complete the sale of these lands *orally* or in writing, to the best of my knowledge, I gave him an extension orally for a short time. As to the time of the extension which I gave him beyond the time expressed in Exhibits 1 and 2 [the letters above set forth], McVeety showed me a contract which he claimed to have made with the defendants for the exchange of these lands, and I read it over, and the time that I gave him to complete these, as near as I can remember, was the expiration of the contract he had in his hand at that time." That extension was an oral extension. The letter of instruction written by Cashier Lyon accompanying his deed to the First National Bank of Harvey was sent under his (Ross's) instructions. "I have since discovered that there was an omission of one description of a piece of land in the letter sent by Lyon just referred to. I have discovered that it seems to be short 80 acres. As to whether or not that 80 acres was described in the deed which I executed and forwarded I am in doubt, after seeing Lyon's letter, but what we omitted to put that in." He testifies, after examining the deed, that 80 acres was omitted from it, omitted by mistake. Ross testifies over objection that he had been ready, able, and willing, at the request of McVeety, to convey, by his warranty deed to defendants, all of the said lands, consisting of 1,200 acres as described, excepting the 160 acres covered by said certificates, which he had assigned to defendants. The consideration paid him for the transfer of the half section thereafter in June of that year was \$16,000 for that half section. The deed to defendant company was a conveyance subject to mortgages aggregating over \$4,400.

Plaintiff testified that he had made arrangements to procure of the First National Bank of Harvey some twenty-two to thirty thousand dollars to pay off any encumbrances on the land that defendant should require to be paid should they elect to take the land free of encumbrances, and also to apply toward paying off Ross should the amount of cash to be paid by the Mercantile Company, over and above the \$18.-

000 allowed for the building and the additional amount at which the stock would inventory, not be sufficient to pay up all that would be due in cash to Ross.

It is further undisputed that on every day during the week from June 6th to June 11th, inclusive, McVeety appeared at the store of the Mercantile Company and demanded of Phillips, in charge, that they proceed to take the inventory under the contract as a partial performance of it, and during this time had his appraiser, mentioned in the contract, ready to proceed with the inventory. That Phillips had their appraiser in readiness to take the inventory and had caused the stock to be looked over preparatory to the inventory being taken, but had delayed starting the inventory until after the inspection of the abstracts of title and deeds to the Minnesota land, and until Sayre could forward from Canada his deed to the lots upon which the building stood, which deed was in Phillips' hands on or before June 11th, the deed of Sayre running to the Harvey Mercantile Company as grantee apparently that it might reconvey by warranty deed to McVeety in closing the deal. During the week of June 6th to 11th, McVeety notified Phillips that if the deal was not closed according to contract a damage suit against the defendants would be the result, Phillips stating that "McVeety commenced to intimate that he did not care much whether the deal went through or not. That he really preferred a damage suit." And telegrams are in evidence communicating news of such contemplated suit in case of default to the officers and principal stockholders of the company, then in Canada. There is also evidence tending to show that, soon after the execution of the contract of purchase and sale, the general conditions of the country changed because of drouth and climatic conditions, giving rise to possible inference from the testimony that both parties to the contract might, because thereof, be more or less reluctant to carry out its terms, and a reason why plaintiff should prefer a damage suit to a performance of the contract. This, however, is strenuously denied by all parties, who claim to have been acting in good faith throughout. In any event, no delay occurred in the commencement of suit, the complaint being verified June 21, 1910.

The plaintiff for his cause of action pleads that at all times from May 27th to and including June 11th, the fifteen-day period mentioned

therein, he was ready, able, and willing to fully perform all his part of the contract to convey this entire tract by good and sufficient warranty deed to the defendants. This is, by answer, denied and the first matter for consideration. Regardless of any defaults of the defendants, before plaintiff can recover, as the basis of damage he must show, as he has plead, an ability to have fully performed on his part the contract according to its terms; and here we notice he has never possessed title to the whole or any part of the land he has agreed to convey by his own sufficient deed of warranty. Nor has he had one dollar invested in said land. Nor has he had a contract of purchase with the owner. On the strength of a mere offer by the owner to sell, and not upon a contract of sale or any interest in the land as against the owner, plaintiff has made his contract to sell and convey by his own warranty deed thereof. He is an entire stranger to the title of this land. While some of the earlier cases hold that a person in such a position cannot enter into a lawful contract of sale, the later cases and the weight of authority is to the contrary. One may contract to deliver title even though he does not have it, so long as he is not a mere volunteer and is acting in good faith in so contracting. 39 Cyc. 1213. Though holding no contract of sale or instrument whereby plaintiff could enforce a conveyance from the owner, yet he acted under permission of the owner, and must not be regarded as a mere volunteer, but as one authorized and capable of entering into a valid contract. But does the proof establish the necessary averment of the complaint that plaintiff, during the lifetime of this contract, has been able to convey by his own warranty deed as he has contracted to do? Manifestly it does not. The proof of his ability to perform requires proof of title in him or proof of some contract enforceable at law whereby he may, within the time limited in the contract, or a reasonable time thereafter, time not being of the essence of this contract, require the owner to clothe him with the title that he may convey the same. "If the vendor does not acquire such an interest in the estate as is susceptible of conveyance at the time provided for by the contract, there is, of course, a breach of the contract." 39 Cyc. 1213. Instead of possessing these essentials to this suit for damage as proof of his ability to perform, he has established at the most but a willingness on the part of the owner to convey to the plaintiffs, not in performance of his contract of sale,

but, instead, the substitution of a new agreement of purchase and sale of realty between third parties, neither of whom is under obligation in law to perform. If we should hold that defendants must accept this deed as compliance with plaintiff's contract, we would be in fact making and enforcing a new substituted contract, and also overriding a statute (§ 5253, Rev. Codes, 1905) which provides that plaintiff has no right to compel defendants to accept any condition more or different than what defendant has bound himself by his contract to plaintiff to perform. The statute reads: "An offer of performance must be free from any condition which the creditor is not bound on his part to perform." Under this statute this offer to perform from a third party cannot be plaintiff's offer, as the importing of a third party into the contract, if it were possible, would import conditions therein concerning which the defendant has not contracted. And again the contract upon which the damage is based, and upon which the proof of ability to perform has been offered and is being considered, is that plaintiff shall transfer title to this tract by his own deed of warranty, thereby calling for the transfer by his own instead of the deed of a third party, and is to the effect that plaintiff, and not a third party, alone shall covenant and warrant the title. The right to exact of plaintiff his warranty deed containing covenants of title is a property right, contracted to be given by plaintiff as a part of the consideration for and as a part of the performance of the contract. The covenant of warranty is valuable; and the right thereto from a particular person, in this instance the plaintiff, must be presumed to be of value; and when we find the same within the express terms of the contract, attempted compliance without plaintiff's covenants should not be held to be a substantial compliance with the contract. If there be any question concerning plaintiff's obligation to convey by his own deed, as distinguished from a third party's, to substantially comply with the contract that he personally shall so transfer, § 5401, Rev. Codes, 1905, puts that question beyond dispute. It reads: "An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property." And such is but the rule in the interpretation of such contracts independently of statute. 39 Cyc. 1554, 1555, and numerous cases cited. Then, again, the time and manner of performance being specified in the contract, the same is

controlling in such respects. 39 Cyc. 1553. The only reasonable conclusion to be drawn from the terms of this contract is that the closing of the deal was to be made by the delivery by plaintiff of his good and sufficient deed of warranty, conveying title to this 1,200 acres to the Mercantile Company, defendant, and the delivery by said defendant to McVeety of the bill of sale of its stock of merchandise, and the delivery by Sayre of his warranty deed conveying title to the Mercantile Block to McVeety, and the payment by the Mercantile Company of the difference between the \$18,000, purchase price of the store building and lots, together with the inventoried price of the goods and the contract price for the 1,200 acres of land, \$66,000, the exact amount of such difference not being in evidence except that it is estimated at about \$30,000. But summarized, the closing of the deal involved the delivery of the deed to these 1,200 acres and payment therefor by the defendants; the delivery and the payment being concurrent conditions and exacting concurrent action by the parties, and to the effect that neither parted with title or money in advance of the reception from the other of the title or money or goods to be received as the consideration for the deal. The contract, as we have said, calling for the conveyance by McVeety, makes an essential to its performance an ability at some time during the period of performance of the contract of plaintiff to perform the same by a transfer by him, investing defendants with the title he has contracted to convey to them. Under the contract this ability to pass title contracted for involved the necessary ability to procure the same by McVeety in advance of the payment by defendants for the land and independent of the means or money of the defendants, and this is the ability that McVeety must establish as existent in himself before he can predicate damages upon any default of defendants in performing their contract. And in this connection the evidence shows conclusively an intent in McVeety not to procure title in himself to the land, but instead to substitute the title of the owner, and deliver the same to the defendants in an attempted performance of his own contract, calling for his own conveyance. Granting that he intended to procure title to himself and then convey the same, which assumption would be contrary to the evidence, he would then be, on his own showing, in a position whereby to procure such title in himself he would necessarily have to first obtain the use of the de-

fendants' money and pay Ross therewith from the money or property of the defendants, and thereafter transfer the title thus procured to the defendants in performance of his contract. This would make the payment of the money by defendants necessarily a condition precedent to their right to exact McVeety's deed, instead of their right under the contract that the delivery of money should be concurrent and instantaneous with their receipt of the deed conveying title to them of what they have purchased by such payment. Hence, to hold that plaintiff possessed the ability to transfer contemplated in law and necessary upon which to predicate an action for damages, we would be obliged to ignore the terms of the contract making the payment and receipt of title concurrent conditions, and, on the contrary, hold that its terms as to performance contemplated that defendants should part with the money in advance of a delivery to them of the title, the consideration for the payment, with the necessary result of requiring them to run the risk of McVeety's ability to procure title in him, and to do which an expenditure of defendant's money would necessarily be involved and the corresponding attendant risk suffered by defendants for a period long or short according to the controlling circumstances in procuring title to that for which they must have already parted with a contract consideration of \$66,000. This logical and unfailing result of respondent's contention on the present ability of plaintiff to perform the contract is repugnant to all principles, equitable or legal; and, so far as we can find, is utterly without support in the authorities. If plaintiff can be said to have made proof of his ability in such respects to perform the contract, then clearly no financial ability is necessary other than to procure the use, without legal right, of a purchaser's money with which to purchase title that it may in the future be conveyed, and all of which is without the contemplation, or contrary to the express terms of, the contract to sell. As authority for our conclusions we cite *Gray v. Smith*, 76 Fed. 525, appealed and affirmed in the circuit court of appeals for the northern district of California, 28 C. C. A. 168, 48 U. S. App. 581, 83 Fed. 824; and also *Royal v. Dennison*, — Cal. —, 38 Pac. 39, before that court again in 109 Cal. 558, 42 Pac. 39. The former case, *Gray v. Smith*, concerns an interpretation of California Civil Code provisions identical with our own, and is so parallel in facts and conditions as to be almost interchangeable with those in the case on trial. Briefly, the

facts involved an exchange of 8,421 acres of land at an agreed price of \$120,000, which, together with \$125,000 cash, constituted the agreed purchase price to be paid for a block in San Francisco. The plaintiff, Gray, occupied the identical position of McVeety in this suit, having obtained a written offer from Donohoe, the owner of the city property, that he would deed to one Mills, since deceased, represented by Smith, executor of the Mills estate. Title deeds from the owner, transferring good and sufficient title to Mills as grantee, were tendered by the plaintiff, who, supposing the title to be defective when it was not, refused to accept it or pay the contract price therefor, which had been, as between Gray and the owner Donohoe, fixed at \$165,000. It is conceded that the supposed defective title was good, and that, had Mills performed, he would have received all he had contracted to obtain from plaintiff. The case is unquestionably on all fours with the broadest state of facts in plaintiff's favor for which he can contend under the testimony. The following is the reasoning of the court: "The land which the plaintiff was to convey did not belong to him, and he had not then nor did he afterwards acquire any estate or interest therein. He had received a written offer from the owner of the property to sell it for \$165,000 cash and one half the taxes of the current year. The offer was never accepted. It was without consideration. It was a bare offer to sell, and could have been rescinded at any time. . . . It left the property in the same relation to the contract in which it would have stood had there been no such instrument. When Mills withdrew from the contract he had discovered that the title to the land he was to purchase was not in the plaintiff, but was in Donohoe. It is true that he did not place his refusal to perform upon that ground, but on the ground that the title in Donohoe was found to be defective; but that fact is immaterial so far as this case is concerned. The case presented for our consideration, therefore, is one in which the plaintiff made a contract to sell real estate of which he was not the owner, and in which he had no right, title or interest, nor the ability to compel, by the law or otherwise, a conveyance from the owner.

"It is contended by the plaintiff in error that the refusal of Mills to be bound by his contract, before the time for its completion had arrived, excuses the plaintiff from showing or proving that he had the ability to perform the contract upon his part. It is true that where the vendor

of property, before the arrival of the time for the completion of his contract of sale or conveyance, disables himself from performing by disposing of the property to another, the purchaser may at once bring his action, and he need not aver or prove tender of the purchase money upon his part nor his ability to carry out the contract; and where either party to a contract gives notice to the other that he will not comply with its terms, the other is excused from averring or proving a tender of performance. But in any case of action upon a contract the elements of the plaintiff's damage must be certain and the facts must exist from which it may be deduced that he has suffered loss. One who makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damages to him may be predicated if the purchaser withdraws from the contract. The pleadings and the finding in this case leave it uncertain whether the plaintiff could ever have acquired title to the Market street lot. So far as the performance of his contract was concerned, he was in no better attitude than one who has disabled himself from carrying out a contract of sale by selling the property to another,"—citing *Bigler v. Morgan*, 77 N. Y. 312; *Heron v. Hoffner*, 3 Rawle, 393, 400; *Bank of Columbia v. Hagner*, 1 Pet. 464, 7 L. ed. 222; *Traver v. Halsted*, 23 Wend. 66; *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362, 363; *Townshend v. Goodfellow*, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; *Burks v. Davies*, 85 Cal. 110, 20 Am. St. Rep. 213, 24 Pac. 613; *Carpenter v. Holcomb*, 105 Mass. 285; *Lawrence v. Miller*, 86 N. Y. 131; *Nelson v. Plimpton Fireproof Elevating Co.* 55 N. Y. 480; *North v. Pepper*, 21 Wend. 636. To which we may add *Wells, F. & Co. v. Page*, 48 Or. 74, 3 L.R.A.(N.S.) 103, 82 Pac. 856; *Sievers v. Brown*, 34 Or. 454, 45 L.R.A. 642, 56 Pac. 171; *Hampton v. Speckenagle*, 9 Serg. & R. 212, 11 Am. Dec. 704; *Mix v. Beach*, 46 Ill. 311; *Wallace v. McLaughlin*, 57 Ill. 53; *Peck v. Brighton Co.* 69 Ill. 200; *Birge v. Bock*, 24 Mo. App. 330; *Steiner v. Zwickey*, 41 Minn. 448, 43 N. W. 376; *McNamara v. Pengilly*, 64 Minn. 543, 67 N. W. 661; *Meyers v. Markham*, 90 Minn. 230, 96 N. W. 335, 787; 39 Cyc. 1554, 1555 and 1556; and cases there cited, including the recent case of *Weitzel v. Leyson*, 23 S. D. 367, 121 N. W. 868, holding that "under a contract of sale of land to which the vendors held no title, they were required, by their

covenant to convey by warranty deed, to procure title in themselves, as a tender of the deed of any other person would not comply with the contract unless the purchaser waived his right to a deed from them." And 29 Am. & Eng. Enc. Law, 610: "The purchaser is not as a rule bound to accept a good title from a third person." "Where nothing to the contrary appears the good title to which the purchaser has a right must be made out by the vendor himself or by his legal representatives acting as such." Citing in addition to the foregoing authorities: *Re Bryant*, L. R. 44 Ch. Div. 218, 59 L. J. Ch. (N. S.) 636, 63 L. T. N. S. 20, 38 Week. Rep. 469; *Hussey v. Roquemore*, 27 Ala. 281; *Gaar v. Lockridge*, 9 Ind. 92; *George v. Conhaim*, 38 Minn. 338, 37 N. W. 791. To which we may add the recent case of *Buswell v. O. W. Kerr Co.* 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837, holding: "Where a vendor is under contract to execute and deliver a deed with covenants of warranty, the vendee is not bound to accept the deed of a third party, although the real owner." To hold otherwise "would require respondents to accept a title which it did not contract to receive, and to accept a deed with warranties from a party which it did not agree to accept." Consult title, "Vendor and Purchaser," Century Dig. § 302, and Decen. Dig. § 151.

Respondent attempts to meet the charge of the appellant that plaintiff has not shown his ability to perform the contract, by asserting that "during the life of the contract McVeety had absolute control of the title to the Ross land, and could have conveyed the same to the defendants if the time had arrived when the duty of transferring the title to such defendants was imposed upon him." We have examined all the evidence carefully, and are forced to the conclusion that this statement is not only contrary to fact, but wholly without support in the testimony; and that it is shown, without any conflict, and beyond question, that at no time mentioned in the evidence or within the lifetime of the contract or thereafter, so far as the evidence bears thereon, did McVeety have "absolute control of the title to the Ross land, and could have conveyed the same to the defendants."

The evidence discloses that Ross carefully avoided transferring to McVeety, or dealing with him, or entering into any contract whereby Ross was obliged to transfer to McVeety. The letter of Lyon to the First National Bank of Harvey gave the most explicit instructions

concerning the delivery of the deeds, and directs not the delivery of the deeds to the bank, as McVeety has contracted should be done, but the presentation only of the deeds. Notice these explicit instructions. They read: "Kindly *present* these papers at the bank, but *retain possession* of the same until payment of the above amount *is made to you* for remittance to us." "These papers are to be *presented* by you for us at the Bank of Harvey, and delivered to said bank for the said Harvey Mercantile Company, or directly to the officers of said bank, at said bank, *upon the payment to you for remittance to us of \$38,061.10.*" "We anticipate that after you present these papers at the bank, and *they know that you have them subject to delivery* at any time within the period above mentioned, they will inform you when they are ready to close the deal and pay the money." Notice as yet no delivery is directed to McVeety. Concerning this all that is found in these instructions is the following: "These papers affect a land deal of considerable importance in which James H. McVeety of your city is interested, and no doubt he will see you about it." "These papers are sent to you for the accommodation of Mr. McVeety, and your compensation, including exchange, should be paid by him, and he will pay the same upon request by you so to do. Kindly acknowledge receipt." Such were the instructions concerning the only delivery of deeds authorized by Ross, who has testified he authorized this letter of instructions. When and how McVeety has ever had control of the title to this land must be found contained within these instructions, and they are explicit that a delivery was to be made to no one except the Bank of Harvey or "said Harvey Mercantile Company," and then only upon the payment in cash of over \$38,000, not to McVeety, but to the First National Bank, the responsible agent selected by Ross to act for him in the most important matter of the delivery of deeds, the parting with his title and the transmission to him of the purchase price. This is as far from the control of the title as it is from meeting the contract requirement of a delivery by McVeety to defendant, Mercantile Company, of McVeety's warranty deed. And Ross does not claim that he would have executed and delivered his deed to this land to McVeety as grantee. If we would assume that the mere permission by Ross to McVeety to sell Ross's land in question would obligate Ross, if accepted, to transfer to McVeety, we are still met with the barrier that McVeety has never accepted such offer, and has never been, therefore, in position

to compel Ross to transfer to him, and thus clothe him with ability to meet his contract with these defendants. Not only is there no ability established as ever having been conferred by Ross, but instead there is full and uncontradicted proof that McVeety did not have the ability, not having even the right of purchase as against the owner of the premises he has contracted to sell defendants. Respondent, on this question of ability to transfer, in the brief says: "Defendants, however, never called plaintiff's attention to the fact that the transfer of title was from Ross instead of McVeety, and never objected thereto, *although McVeety was able to give his own deed, and was ready to take any steps necessary to a full performance. McVeety also had absolute control of the title.*" What is here said as to the failure of appellants to object is predicated upon a statement that McVeety was able to give his own deed, and was ready to take any steps necessary to a full performance, which we have shown is contrary to the evidence and an unwarranted assumption of fact. So far as this is urged on the question of tender of performance by McVeety, it is immaterial, as an ability to perform must be established before a tender of performance or any alleged default thereunder and accruing from a tender can be material. We are therefore not concerned with what the legal effect of a tender of performance by McVeety to defendants would have had upon the rights of the parties, because it affirmatively appears that McVeety had not the ability at any time to perform his part of his contract. And the same is true as to all testimony concerning the failure of the defendants to proceed with the inventory during the week of June 6th to 11th inclusive. Grant that defendants became in default in failure to proceed with the inventory and were in default thereafter, which under the evidence is doubtful, that in no wise relieves plaintiff from the burden assumed by him at the commencement of the action, by his pleadings, and remaining throughout, that before he could recover, regardless of the defaults of the defendants, he must have shown his own ability to have performed his agreement to convey by his own warranty deed during the lifetime of the contract or within a reasonable time thereafter, granting that time is not of the essence of this contract. It is indeed doubtful if the complaint in this action on the question of ability is not demurrable as containing insufficient allegations in such respect, an allegation of willingness and ability to perform not pleading the facts.

Washington v. Ogden (Turner v. Ogden) 1 Black, 450, 17 L. ed. 203, wherein concerning a similar contract of purchase and sale, and a recovery of damages thereon, the court says: "To entitle the plaintiffs below to recover in this suit, the declaration should have averred that such deeds of surrender and cancelation had been duly executed; that the plaintiff had a perfect title free of all encumbrances, and was able as well as willing and ready to convey a good title to the plaintiff on the day named in the agreement. But he was not able to prove such averments if they had been made, and in his case failed both in its pleadings and in its proofs." It is unnecessary to declare this rule as to pleading there announced as controlling, but this case cited but adds to the many already given as to the necessity to prove ability of performance. Manifestly plaintiff could never have plead facts sufficient to show what he has alleged by legal conclusions instead; that is, his ability to perform this contract he had made with these defendants.

The evidence shows conclusively that on a new trial plaintiff would be unable to establish that he ever had the ability required to perform the contract. Ross parted with title to a half section of this land about contemporaneous with the commencement of this action, and his testimony is that he never made any further attempt to permit McVeety to close the deal. The title papers were returned to Ross, and with their return expired McVeety's permission to deed to others the land of Ross. It conclusively appears that McVeety cannot establish any other act toward a performance of his contract than already disclosed in evidence. Defendants at the close of plaintiff's case, and again at the close of all the testimony, moved for a judgment of dismissal on the particular grounds here upheld, "that the plaintiff has failed to show that he was able to perform the contract according to its terms," again urged on defendants' motion for judgment of dismissal notwithstanding the verdict. It is, therefore, ordered that the judgment appealed from be in all things set aside and that the District Court enter a judgment dismissing this action, with costs below and on appeal awarded to defendants and against plaintiff.

STATE EX REL. MINEHAN v. THOMPSON.

(139 N. W. 960.)

Election on county division — returns — omission of precincts — mandamus to declare result — burden of proof.

At the general election in 1908 there was submitted to the voters of McLean county three propositions for county division, including that of the proposed county of Stevenson, concerning which the election returns from forty-five only of the fifty-one precincts of McLean county were returned by the precinct election boards to the county auditor, and only such forty-five precincts as were returned were canvassed, abstracted, and certified as to the result of such election by the county canvassing board, who made return that in said forty-five precincts 1,006 votes favored the creation of Stevenson county, with 741 votes against its creation. No return of the votes cast on such county division proposition was ever made or canvassed or included in said return as to the six omitted precincts of Douglas, Turtle Lake, Butte, Roseglen, Whittaker, and Shell Creek; in which six omitted precincts 354 electors voted at said election, sufficient in number to have constituted a majority against county division had they all voted against such division. No proof of the result of the election is in evidence other than the certificate of the canvassing board of the county, showing on its face such omission to canvass these six precincts, and a stipulation of their omission from the returns and canvass, and that 354 electors voted in such six omitted precincts. In this mandamus proceeding, based upon the above facts, regarding which there is no dispute, in which it is sought to compel the county auditor to certify to the secretary of state that a majority of all votes cast in said county at said election on county division was for the creation of Stevenson county, and upon his refusal to so certify, it is *held*:—

(1) It was the duty of the canvassing board of McLean county, under § 673, Rev. Codes 1905, to procure the returns to be made and canvassed from such six omitted precincts.

(2) That the abstract of the vote upon such division proposition, required under § 651, Rev. Codes 1905, shows on its face that it is incomplete, and but a partial canvass of the whole vote cast in the county on such question.

(3) Such returns are prima facie evidence of the precincts canvassed and abstracted by precincts as required by statute; and where it appears on its face to be incomplete, as not including the vote cast in six out of fifty-one precincts in the county, such returns are not prima facie evidence of the result of the election as to all precincts in the county, the proof of the result of an election in forty-five precincts not constituting prima facie proof as to the result of an election held in fifty-one precincts, the whole county of McLean.

24 N. D.—18.

(4) The burden of establishing that county division carried by a majority of all votes cast in said county of McLean at said election is upon the relator, who, by his pleadings and from the nature of the relief asked, must establish such fact before the court can find that a majority existed in favor of such county division proposition.

(5) Prima facie proof as to the result of such an election as to forty-five precincts covered by such abstract of returns by precincts is insufficient to entitle relator to relief, the further burden resting upon him to establish that the actual vote of such six precincts could not in fact change the result of the election as canvassed in said forty-five precincts; and there being no proof whatever of the vote on such question in such omitted precincts, and in which precincts the court will presume some vote was cast in each upon county division, it is impossible to determine that a majority of all votes cast in the whole county were in favor of county division. Accordingly, relator has not met the burden of proof upon him to establish such fact, there being a failure of proof as to what the total vote of the county was upon the proposed county division.

(6) The petition and alternative writ alleging the submission of such question at a general election, and that the returns thereof from each and all of the election boards of all the precincts in the county were made and returned and by the county canvassing board canvassed, with the result thereby determined in favor of such county division, it is proper for a county auditor against whom the proceedings are brought to answer, on behalf of himself and parties interested, and therein put in issue matters alleged in the petition and alternative writ, and allege a failure of returns from a portion of the precincts, a canvass by the board of only a part of all the precincts in the county, and that the abstract of returns as made by the county canvassing board is incomplete, and not a finding of the result of the election in all the precincts of the county, and that county division did not receive a majority of all votes cast at the election in such county on such county division proposition. Such an answer but raises issues of fact properly triable in mandamus; and the abstract of the vote of a portion only of the precincts of such county does not have the force of a certificate of election covering all precincts in said county, or preclude the trial of the issues of fact involved in this mandamus proceeding, and compel the auditor to resort to a statutory contest to determine the actual result of the election.

(7) It was proper to consider, as evidence, stipulated facts as to the number of electors voting at such a general election in the six omitted precincts, as additional proof that the returns as certified were incomplete, and as being admissible under the burden of proof upon relator under the pleadings; and also as showing facts upon which might be based the exercise of discretion by the court in the granting or denial of the writ, the right to which is not a strict legal right, but discretionary to the extent that the court should not issue the writ until the relator fully prove himself entitled to the redress sought by the

writ. To determine the relator's right to the writ the trial court could receive testimony, even though a prima facie right thereto had been established.

(8) Section 168 of the state Constitution, providing that "all changes in the boundaries of organized counties before taking effect shall be submitted to the electors of the county or counties to be affected thereby, at a general election, and be adopted by a majority of all the legal votes cast in each county at such election," makes it the duty of the court to know that a proposed county division has been so approved by such majority vote of all electors in the county voting upon the question, before the court can hold county division to have legally carried and issue the writ of mandamus asked for. Under this constitutional provision, all doubt as to the result of the election must be resolved against a relator seeking to obtain a judicial determination that a new county has been so created.

(9) To entitle relator to the writ, the burden is upon him to establish that a majority of all votes cast in said county on said proposition at the election was in favor of such county division; and no proof having been made in this case as to the result of such election in McLean county, there is a failure of proof; and it is ordered that the alternative writ and order for peremptory writ, and the peremptory writ thereon issued, be vacated and quashed and these proceedings dismissed.

Opinion filed November 23, 1912. On petition for rehearing February 10, 1913.

Appeal by defendant from a judgment of the District Court for McLean County, *Crawford, J.*, in a proceeding to determine the result of an election on the division of McLean county.

Reversed and dismissed.

H. F. O'Hare, Geo. R. Robbins, and Geo. A. Bangs, for respondent.
McCulloch & Nelson, and Engerud, Holt, & Frame, for appellant.

Goss, J. This proceeding by mandamus was brought in district court to determine the results of an election on the division of the county of McLean. Relator asks that the existence of the proposed county of Stevenson be declared and established, and the county auditor be required to issue and forward to the secretary of state a certificate certifying such county division carried by a majority of all votes cast at the election had thereon in 1908, and certifying to boundaries and name of said county. This action has twice before been before this court, in various forms. 19 N. D. 804, 124 N. W. 701; and as an incident thereto the original proceeding of *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282. See also *State ex rel. Minehan v.*

Wing, 18 N. D. 242, 119 N. W. 944. The first-named proceeding involved matters of pleading and practice, and whether the return of the alternative writ of mandamus in any of the many matters therein presented amounted to a defense in the light of the stipulated facts of the case accompanying the pleadings on appeal, resulting in a reversal of the judgment that a peremptory writ issue and the remanding for further proceedings to be had in the district court. Thereafter, and before trial on the merits, the auditor, disregarding the pendency of the action to determine the propriety of the issuance of the certificate certifying that the election had been carried by a majority vote, and the boundaries and name of the county, issued such certificate, forwarded the same to the secretary of state, who in turn notified the governor thereof, who thereupon appointed county commissioners for the county of Stevenson. Proceedings in the organization of this county were there stayed summarily by the original writ of this court, issued on relation of the attorney general in State ex rel. Miller v. Miller, and upon final hearing all proceedings, including said certificate so issued, were vacated, and the *status quo* reinstated pending trial in the district court of this case now here on appeal from that court's decision, granting the peremptory writ, and in effect thereby adjudging legal the foundation for the organization of said Stevenson county. The case is now before us on the merits under the issues joined by the petition and alternative writ and the return thereto of the auditor.

The alternative writ, following substantially the petition, briefly recited, shows the right of relator to be such, the boundaries of the county, the preliminary steps to the election on the creation of Stevenson county, the submission of such propositions to the voters of the county of McLean at the general election in 1908, the notices of election on said proposition and the election held thereon, and "that the said judges and inspectors of said general election in each and all of the precincts of said county made a statement in duplicate on blanks provided for that purpose, showing therein the number of votes cast for and against the formation of the said new county of Stevenson; and certified the same to be correct, and the same were duly subscribed and filed in the office of the county auditor of said McLean county, with the returns of such general election, according to the statute in such case made and provided; that thereafter, on or about the 16th day of November, A. D. 1908, the can-

vassing board of said McLean county met pursuant to and as directed to and required by statute, and, after taking the usual oath of office, opened and publicly canvassed the returns theretofore made to the said county auditor of said McLean county of the said general election hereinbefore referred to, and especially the returns of the votes cast by the voters of said McLean county upon the formation of said new county of Stevenson; and that the said canvassing board of said McLean county found that there were 1,006 votes cast 'for new county' and 741 votes cast 'against new county' on the question of the formation of said new county of Stevenson," "by the voters of said McLean county at said general election in said county of McLean; and thereupon the said canvassing board of said McLean county canvassed and abstracted said votes, and so certified the same" "in like manner as the votes are canvassed and the returns made as in the case of the election of members of the legislative assembly of the state of North Dakota."

Then follow averments that the county auditor refuses to certify and make his certificate showing the result of said general election, and the formation and the boundaries and name of said county, and transmit the same to the secretary of state, as required by § 2330, Rev. Codes 1905, as amended by chap. 62 of the Session Laws of North Dakota of 1907; and closes with a command to so certify or make return of the reasons for refusal so to do.

It will be noticed that the foregoing portion of the writ, literally copied, alleges that the official returns by the election boards "in each and all of the precincts of said county" were made to the county auditor, and canvassed and abstracted by the canvassing board of said county, who "found that there were 1,006 votes cast for new county and 741 votes cast against new county;" and that thereupon "the said canvassing board of said McLean county canvassed and abstracted said votes and so certified the same." Bear in mind, then, relator specifically pleads that the election boards in each and all the precincts in McLean county made returns on said county division question, as provided by law, to the county auditor, and said returns were, by the county canvassing board, opened, canvassed, and abstracted. The auditor answers, among other alleged defenses, that out of the fifty-one election precincts in the county of McLean no returns to the county auditor were ever made by the election boards in six of said precincts, designated by name, and

that the board of canvassers of McLean county never canvassed the votes on county division cast in said six precincts, and that the aggregate number of electors who voted in said precincts at said election was 354, more than sufficient to have changed the alleged election result had they voted on said question, and said vote had been returned and canvassed and included in the abstracts of votes, as should have been done. That "it was held and determined by said canvassing board that the proposition to form Stevenson county was lost;" "that the county commissioners of McLean county and the county officers thereof all understood and believed in good faith that under the laws of this state the said proposition to create Stevenson county had been defeated;" "all of which was well known to the relator herein and to all other persons in the same situation as relator and interested in the question of the formation of Stevenson county." "That this defendant and many other citizens in said McLean county would have contested said election with respect to the vote on Stevenson county had they known or been informed in proper time that it was asserted or claimed that said vote was, on the face of the returns, sufficient to authorize the formation of Stevenson county; but this defendant and other citizens generally who were adverse to Stevenson county in good faith believed and were led to believe by the silence and nonaction of the supporters of Stevenson county that it was conceded that the Stevenson county proposition was defeated, and therefore did not institute any contest."

Then follow allegations of insufficient notice; dissemination of misleading information acted upon by the voters, causing them to refrain from voting against the proposition, under the belief that a failure to vote was in legal effect a vote against the formation of the county; that 3,600 votes were cast in said county at said general election, at which two other county division propositions were submitted, one carrying by a majority of all votes cast at the election, and thereby creating what is now the organized county of Sheridan; that one county division proposition so submitted overlapped, in territory embraced, both of the other two, so that an affirmative vote on all three should not be counted and was in effect a negative vote, and that as to this county of Stevenson, fifty-two such votes are included in the alleged majority therefor; and that, inasmuch as a majority of the affirmative votes for Stevenson county did not exceed one half of all votes cast at the election on all county

division propositions then submitted, said county could not be created under § 168 of the Constitution and under the statutes regulative of county division.

Of the many interesting questions thus arising, but one, and that conclusive of results of said election, need be considered. This arises upon the pleadings, and the sufficiency of the proof, and the law applicable thereunder concerning whether a legal and sufficient canvass and abstract therefrom of votes was ever made by the county canvassing board. The issue of fact regarding this is presented by the pleadings, to which reference has heretofore been made. Bear in mind the alternative writ and petition therefor constitute the complaint. High, Extr. Legal Rem. 451; 26 Cyc. 470. Also that the burden of proof is on relator, as in ordinary actions and proceedings, to make out a prima facie case by proof of the necessary averments of his pleadings. High, Extr. Legal Rem. §§ 448-451; State ex rel. Johnson v. Ely, 23 N. D. 619, 137 N. W. 834. "On an application for a mandamus, the burden of proof is governed by the general rule that the party holding the affirmative of the issue must establish his allegations by a preponderance of the evidence. The relator must prove himself entitled substantially to every claim and to all the redress which he seeks in his writ." 26 Cyc. 476. How is this burden upon plaintiff met under the facts, which, by the way, are in such particular stipulated? Unless Exhibit D, hereinafter mentioned, makes prima facie proof of the right to relief, the following stipulation effectually answers this question: "It is stipulated that no returns on the vote on any of the questions of county division appearing on the ballot (a ballot containing all three county division propositions) were ever made to the board of county canvassers from the following precincts of McLean county, *viz.*, Butte, Douglas, Roseglen, Whittaker, Shell Creek, and Turtle Lake; and the aggregate number of electors who voted in said precincts at said election was 354." The precincts named are the same as those designated in respondent's answer as the precincts from which no returns were ever made or canvassed. The language of this stipulation is carefully chosen that it may be so explicit and certain as to leave nothing to intentment, interpretation, explanation, or presumption. It establishes "to a certain intent in every particular" the facts pleaded by answer, and that but forty-five out of fifty-one precincts were in fact canvassed by

the board and included in the abstract of votes. In connection with this stipulation, there was offered and received Exhibit D, such purported original abstract of the votes cast in forty-six of the fifty-one precincts of McLean county on county division matters, from which it appears that no votes are abstracted as to precincts of McLean county numbered 4, 7, 9, 33, 42, and 50, and with totals as so abstracted for and against Stevenson county of 1,006 and 811, respectively, exclusive of said numbered precincts. And accompanying said abstract is the following certificate:

"Total number of voters who voted at the general election held November 3d, A. D. 1908, 3,600.

"Votes cast for governor, 3,437.

"Votes cast on Stevenson county, 1,817.

"Votes cast on Sheridan county, 2,674.

"Total vote cast on division ballots, 2,764."

To which the auditor affixed his certificate, required by § 651, that such constitutes a copy of the abstract of votes cast by such precincts on said county division.

And it was stipulated that Exhibit D, offered in evidence, "is a true and correct copy of the original abstract of votes as made and prepared by the proper officers at the different elections enumerated therein and upon the division questions enumerated, which were held in the different election precincts shown by said abstract in the county of McLean at the time and places therein stated," subject to objection as to relevancy and materiality.

The question before us, then, under this phase of the case, is whether a canvass of but forty-five precincts out of fifty-one in a county, and where there were sufficient electors voting on other questions in the omitted six precincts that, had they voted against the creation of the new county, the negative votes would have exceeded the votes for the creation of such county, while with such precincts omitted a majority as abstracted appears from forty-five precincts out of fifty-one in favor of the creation of the county, is the new county created under the constitutional and statutory provisions relative thereto. If this question must be answered in the negative, this action is thereby determined against relator.

Under the burden of proof, arises the question of whether, by the re-

ception in evidence of Exhibit D, relator has made prima facie proof in his favor of the result of the election. Must this abstract of votes be given the same force and effect as though it was an ordinary certificate of election declaring an election result, such being the office of the usual certificate of election?

Our statute, notwithstanding § 2329, is silent on the necessity of the execution and filing of the equivalent of a certificate of election on the canvass of a county division election, unless it be that either the abstract by precincts on the canvass, required under § 651, or the certificate of formation of the new county, embracing not only the fact of the result of the election but the territorial boundaries and contents and name of the new county, is in effect the certificate of such an election. Considered in connection with § 688, as to contests in county-seat and county-division matters, providing the statutory contest must be begun "within thirty days after the result of such vote is canvassed," instead of from the date of issuance of any certificate or return, it would appear that no certificate of election, strictly speaking, is provided for, and that the auditor's certificate, mentioned in § 2330, as amended by chapter 62 of the Session Laws of 1907, because required by special statute with otherwise no statute requiring aught but an abstract of votes by precincts, constitutes such certificate. A certificate of election is usually issued as a separate instrument from the returns of the board of canvassers, and § 651, the governing statute here, makes the distinction between the certificate of election and the canvasser's returns, by requiring "the county auditor immediately to make out a certificate of election to each of the persons having the highest number of votes for county and precinct offices respectively, and to deliver such certificate to the person entitled thereto on his making application to the county auditor therefor;" and on state-wide questions that said official "shall make a certified copy of each abstract and forward it to the secretary of state" as the returns from such county on such state-wide proposition; and the state board of canvassers, after the canvass made of such "certified abstracts of votes from the several counties," as provided by § 656, issues the certificate of result or the certificate of election according to the fact, as provided in §§ 661 et seq. Throughout all these provisions the distinction between returns of the canvassing board and certificates of election is clearly drawn. Undoubtedly, however,

the return in whatever form, whether it be a certified abstract or instead a formal certificate of election, "makes a prima facie case of the correctness of the matters therein contained." 15 Cyc. 386. But such a return does not necessarily prevent the determination by mandamus of the result of such election and of the legal consequences of the returns so certified. In matters of office contest between two claimants for office, both claiming under an election, it is the rule that where the return of the canvassing board is made upon a full canvass of proper election returns, the board's determination is conclusive in mandamus as to matters which by statute the board was authorized to certify. Such is the holding in *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231. But nowhere can authority be found that a return or certificate of election, showing as here, apparent from Exhibit D, that upon its face it is based upon a partial and incomplete canvass of official precinct returns, is conclusive or even prima facie evidence of the result of such election. It is also true that an election return, or certificate of election, issued upon full and substantial compliance with prior statutory duty, cannot be impeached in mandamus proceedings; nor can the title to office, if prima facie or regular, be overthrown in mandamus. But these questions are without this case. This issue is whether, in this mandamus action to determine the issuance of a writ to create a new county, the court is bound by a return appearing on its face to have omitted the canvassing of six precincts out of fifty-one, and this in the face of a constitutional provision requiring a majority of all votes cast at the election on the proposition to be in favor of the creation of Stevenson county before this writ can issue. We may concede, then, respondent's contention, that a complete abstract by this board of canvassers would be prima facie evidence of what it may contain, including the totals of the vote cast on this county division proposition. But that does not establish that a partial canvass, as is apparent from the face of these returns, is prima facie evidence of anything more than the returns of the vote of that portion of the whole county therein tabulated and certified. It is apparent that the board of canvassers has but partially performed its duty, and neglected to perform the duty cast upon it by § 673, wherein it was required to procure and canvass the official returns from the six precincts uncanvassed and omitted; and adjournment before so doing amounted to a noncompliance

with the statute, and the certificate issued cannot be other than it purports to be, the incomplete returns of duty but partially performed. That it might by mandamus have been compelled in proper season to have reconvened and to procure the returns omitted, and canvass the same, is the great weight of authority. "If the canvassers neglect or refuse without sufficient reason to meet and canvass the votes, they may be compelled to do so by mandamus, and if they perform their duty in part only, or in any other illegal and unwarranted manner, they may be compelled to perform it in full or in a proper and legal manner." *Mechem*, Pub. Off. § 210, and cases cited; *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706; *State ex rel. Johnson v. Ely*, 23 N. D. 619, 137 N. W. 834. In both of these cases the opinion is partially based upon the assumption that, under certain circumstances, it is proper in mandamus to compel reconvening of a board of canvassers and the performance of its duty, the issue being whether, under the facts considered, the writ for that purpose would issue; and this notwithstanding that in the last-cited case a certificate of election declaratory of results of the election had been previously regularly issued and filed. To the same effect, see *Merrill*, *Mandamus*, § 182, that "the fact that a canvassing board has already declared the result and issued a certificate of election to another person is no adequate return to an alternative writ of mandamus to canvass the returns properly, and declare the proper result when the returns have been improperly counted or improperly rejected," citing many authorities. To the same effect is *Spelling*, *Extr. Relief*, § 1557, reading: "Mandamus is not the proper remedy for determining the result of a disputed election, though it may lie, in a proper case, to compel an officer to certify the result of the election. . . . Where the board of canvassers of an election have canvassed but a portion of the returns and issued a certificate of election, mandamus will lie to compel them to reassemble and canvass the returns correctly, and issue a certificate to the one found elected from the whole returns, notwithstanding the person holding the certificate of election has qualified and entered upon the discharge of the duties of the office." Among the authorities cited by this author is *Barnes v. Gottschalk*, 3 Mo. App. 111, an action in prohibition to prevent a subordinate court compelling by mandamus the issuance of a certificate by the mayor of St. Louis, certifying the passage by a majority vote at

an election of a new charter for said city. We take the following from page 120 of that opinion: "It is insisted that mandamus cannot be employed to accomplish the purposes of a contested election. Granted; but here are no such purposes. A contested election can have no existence until after the result has been declared and the certificate awarded by the proper ministerial officer. This, in the present case, has never been done. The proceeding is not to investigate the truth of a declared result, but to compel an official declaration of result where none has been made. Such a process lies precisely within the legitimate operation of the writ of mandamus." Relator began this proceeding in mandamus. The defendant has made reply, not contesting an election, but in effect putting relator to his proof as to the election results. Relator then offers this incomplete abstract as sufficient proof to meet his burden assumed by his pleadings and the issues joined, and asks the court to presume it to be prima facie evidence of the whole election, when on its face it does not purport to be such, but only partial returns, a partial performance of duty by the canvassing board, and evidences an obvious disregard by it of the provisions of § 673.

In no sense can this partial abstract be held to have the force of a completed one, as the partial performance of an official duty cannot be said to be the full performance of it. *Lewis v. Marshall County*, 16 Kan. 102, 22 Am. Rep. 275; *State ex rel. Byers v. Bailey*, 7 Iowa, 390; *McCrary, Elections*, § 269. This authority says: "It is the duty of the canvassers to canvass all the returns, and they as truly fail to discharge this duty by canvassing only a part and refusing to canvass the others, as by refusing to canvass any." "The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance." See also § 272 of the same work, where, speaking of a legislative contest wherein the returns of one county out of five were missing, with the certificate of election signed by the canvassing officers of four out of the five counties, quite similar to the case before us, we find the following comment: "The case did not come properly within the rule that the certificate of the majority of the board is the certificate of the board; for while it is true, ordinarily, that less than the whole number may make a valid certificate in such case, it must be upon a canvass of the whole vote of the district. If a part of the vote is omitted, and the certificate does no more than to show that a

canvass of part of the vote cast shows the election of a particular person, it is not even *prima facie* evidence, because *non constat* that a canvass of the whole vote would produce the same result." Under this authority the return of this canvassing board from forty-five out of fifty-one precincts is not *prima facie* evidence that the same would be the result of a canvass of the whole vote. After the reception in evidence of this proof as to these forty-five precincts, it was incumbent upon relator to at least prove that had all six omitted precincts been canvassed the result would have been the same. Instead he stipulated that 354 electors voted in said precincts at said election, and there rested his case, leaving the court in ignorance of the conclusive question of whether a majority of all votes cast on the county division proposition was in favor of the creation of the new county, and leaving an utter failure of proof on this question.

But to avoid this, the only conclusion, relator asks that we assume that no votes were cast upon county division in the six unreturned precincts. But if any presumption is to be indulged in it is settled that it must be the contrary presumption of fact, and to the effect that there were votes cast upon this proposition in said omitted precincts. State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706, from page 711 of which we quote: "The reasonable presumption is that . . . votes were cast pro and con thereon in all of the election precincts of the county. We cannot disregard the fact raised by this presumption, for no other reason than that no certified statement of the number of votes cast for and against the proposition was made by the precinct election officers." We see no reason for overruling part of the basis of that decision. The presumption, then, is that votes were cast in said six precincts; and in the face of such presumption we cannot assume the returns not containing them to be either *prima facie* or any evidence of the actual result of said election in the fifty-one precincts in McLean county.

But another all-sufficient reason exists as to why testimony should be taken, touching the result of this election, upon which depends the issuance or denial of the writ prayed for. The relator must prove himself entitled to "the redress which he seeks in his writ." 25 Cyc. 476. We may grant the impossible, and assume that upon the reception in evidence of this incomplete abstract of returns a *prima facie* case

of results of said election was made out, and that prima facie relator had then and there met the burden of proof upon him, and that such testimony would have been sufficient upon which the court might in its discretion have issued a writ as prayed for. Assume, also, that such burden had been so met as to the total vote cast in said county on such proposition. Still it does not follow that relator would be entitled to his writ certifying the creation of this new county, as the granting of the writ is a matter not of strict legal right, but discretionary, and concerning which, under this assumed state of the proof, the court, with the answer interposed as here, could have even then exacted further proof of the facts disclosing the actual result of this election, and could have insisted upon the proof of the total number of votes for and against the proposition. And this over any objection that could be urged that the court was in effect permitting a contest of the election. We quote from *State ex rel. Johnson v. Ely*, 23 N. D. 619, 137 N. W. 834. "We hold that the writ [of mandamus, and prayed for in a county-seat controversy] is not one of right, but one to be granted, as a general rule, in the discretion of the court; and that, in determining how his discretion should be exercised, that court to which application is made may take testimony; and that it is not an abuse of discretion to deny the writ when it is shown that its issuance would avail nothing to the relators." This effectually answers the question of the right of the court to require proof of the propositions here made, and after the canvassing board's returns were in evidence, even though the result of the testimony so received and supplementing the returns should overthrow them to the extent of causing the court to adjudge them insufficient and deny the writ. The evidence here so required was admissible for such purpose, and discloses absolute uncertainty as to what the result of said election on county division was in the whole of said county, hence rendering it impossible to grant the writ prayed for and showing conclusively an abuse of discretion in the granting of the writ in the face of such failure of proof.

But yet the greatest reason of all still exists why this writ should be denied relator. To grant the writ, in effect, is to create a new county. This cannot be done under § 168 of our state Constitution without a strict compliance with the letter and the spirit of that fundamental law. It provides the proof to be here exacted as a condition precedent to the

relief sought, by the following language: "All changes in the boundaries of organized counties, before taking effect, shall be submitted to the electors of the county or counties to be affected thereby at a general election, and be adopted by a majority of all of the legal votes cast in each county at such election." This has been construed, as to majority, to mean a majority of all votes cast on county division. See *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360. We do not here determine whether to create this new county a majority of all votes cast on all county division propositions submitted at said election was necessary under such constitutional provision, but most certainly a majority of all votes cast upon the Stevenson county proposition must favor such division before it may be judicially determined as carried within the meaning of the constitutional provision quoted. A parallel case is *Rich v. State Canvassers*, 100 Mich. 453, 59 N. W. 181, where the respondent board failed to procure proper returns from one county in the state, concerning the passage of a proposed constitutional amendment, and officially declared the same carried without the returns from said county. In a mandamus action against the board to reconvene, procure returns, and canvass the vote of this county, notwithstanding such certificate of election certifying the result of the election as the passage of the amendment, the court says: "It is to be noted that under § 1 of art. 20 of the Constitution of the state, no amendment can become a part of the Constitution until ratified by a vote of the people. One prerequisite is equally as essential as the other. The amendment must first receive the requisite majority in the legislature and afterwards be adopted by the requisite vote. The question here involved is not whether the court will, in a collateral proceeding go into proofs to ascertain whether the board of canvassers has committed an error, but whether in a direct proceeding, when it appears that a palpable mistake has been committed, due in part to an omission of duty and in part to a fraudulent and criminal alteration of the returns upon which the determination of the board is based, the board itself may not right the wrong committed and may not be required to do so. . . . But the consequences of holding that the determination of the board of canvassers is forever conclusive, and that no matter how flagrant the fraud perpetrated upon the board or how gross its own neglect of duty, the determination is to stand for all time and an alleged amendment become

a part of the organic law which it can be demonstrated beyond peradventure never received the requisite vote from the electors, are such that we should adopt such construction of the statute only when convinced that no other is open. The able argument of counsel for the attorney general has failed to convince us that the action of the board is not subject to direction by the court by its process of mandamus." And the same holds true here in this case. No one can tell the fact of whether in the fifty-one precincts in McLean county a majority vote duly canvassed would show the approval of the people of that county on this proposed county division. This is all-sufficient upon which to deny the writ. If the constitutional provision can be circumvented and virtually set aside by any such presumptions as here urged from a canvass of a portion of the vote, it is the equivalent of saying that the Constitution does not mean what it says when it requires the adoption of the proposition "by a majority of all the legal votes cast in each county at such election."

Several other questions briefed by counsel might be passed upon, but those already discussed fully decide this case against relator. Upon the relator is cast the burden of making the proof of the result of this election, as to which result it is impossible to determine, there being a failure of proof thereon and concerning a matter in which § 168 of our state Constitution requires unquestionable proof of a majority favoring county division before relator is entitled to this writ.

It is ordered that the alternative writ, the order for and the judgment entered in the District Court granting a peremptory writ requiring appellant to issue the certificate of the division of McLean county and the territorial limits, contents and name of the proposed new county of Stevenson, be in all things quashed and set aside, and judgment directed to be entered dismissing this proceeding on the merits.

SPALDING, Ch. J. (concurring specially). I concur in the result reached by my associates in the foregoing opinion. I do so, however, solely for the reason that this case was before this court in *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701, on an appeal from an order of the district court striking out portions of defendant's return or answer. After due consideration it was there held that the trial court erred in its action, for the reason that the portions of the answer stricken out stated defenses. Among the portions so stricken

out by the trial court and reinstated by this court were those defenses now relied upon in this proceeding. That is to say, the pleadings now before us are in all material respects the same as in the Meyers Case. The action is the same, the only difference being that a newly elected county auditor has been substituted as a party in place of the one holding that office, and defendant, when the Meyers Case was decided. I say the defenses are the same as to matters before us on the present appeal. It is true that in the Meyers Case we held that the publication of the notice of election on county division was invalid. That was held by reason of the counsel on both sides submitting the case on the mistaken view that one section of the statute applied, and subsequently, as indicated in *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282, the same counsel in one phase of the same litigation appeared before us and called our attention to the fact that they had inadvertently relied upon the wrong section, and agreed that as to that part of the decision it should not be binding in this litigation. Hence that defense is eliminated, but other defenses remain the same, and the evidence sustains the defenses so pleaded. This being true the decision in the Meyers Case, except as it relates to the sufficiency of the publication of the notice, is controlling in this litigation, and all this long, tedious, and perplexing litigation has been conducted on the strength of that decision. I am by no means certain that I should now concur in the holdings of that case if the same questions were being considered in the first instance. While it is not stated in the opinion of Judge Goss that other cases should be overruled, it seems to me that it in fact, if concurred in by a majority of the court, would overrule numerous well-considered authorities, including *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706; *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231; *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, and *State ex rel. Johnson v. Ely*, 23 N. D. 619, 137 N. W. 834, and perhaps others. If it is the intention to overrule these authorities, I think it should be so stated in the opinion and thereby prevent the confusion which necessarily follows whenever an opinion is in effect overruled without so stating.

If the Meyers Case is to be ignored, I am of the opinion that, in view of the defective returns, this court would be amply justified in disregarding the technical question as to whether the official abstract of votes

meets the burden of proof cast upon the relator, and remanding the case to the district court, with directions to take evidence as to the vote, pro and con, actually cast in the missing precincts. It cannot be questioned that, setting technical considerations aside, this method would approach most nearly to meting out justice to the respective parties of any that could be adopted. If the election officials of the missing precincts made no returns, the canvassing board was woefully derelict in its duty if it did not require such returns to be made, or, if made, amended so as to show the votes on this question. The law makes specific provision for securing or amending such returns. It is now too late for that board to do this; but the court could, without doubt, supply the deficiency by the method suggested. The new county should not be formed if it did not have a majority of the votes cast on the question; on the other hand, it has a right to be organized if it received such majority. The record before us leaves this question in doubt, and no party could complain if the truth were ascertained, whatever the result. Ample authority is vested in this court, both by statute and precedent, to so dispose of this appeal. But inasmuch as a majority of the court will not concur in the manifestly equitable and just disposition of this proceeding which I suggest, I rest my assent wholly on the authority of *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701, without expressing any opinion on the different phases of the law announced in the opinion of Judge Goss, although satisfied that many of the authorities cited are not in point on any question before us.

BRUCE, J. (concurring specially). I concur in the result of the opinion filed by Mr. Justice Goss. I do not, however, wish to be understood as concurring in, or expressing an opinion upon, all of the propositions discussed either in the majority or dissenting opinions in this case. Much depends upon the conclusions that are to be derived from the former cases of *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701; *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282; *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231; *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706, and *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, and as to what was the actual intent of the court in these cases. As I was not a member of this court at the time of the writing of the opinions therein,

I cannot personally speak as to such actual intention, and prefer to leave that to my associates.

I am, however, clearly satisfied as to two basic propositions, and those are, that there is no showing in this case that the proposition for the creation of the new county of Stevenson was carried either by a majority of the voters who voted upon that proposition, or by a majority vote of the electors who voted upon the question of county division generally. As I understand § 168 of the Constitution, a majority of those who voted upon the question of county division, generally, was necessary; but be that as it may, it is quite clear to me that there is not even a showing that a majority of those who voted upon the particular proposition was obtained. I do not agree with Mr. Justice Burke in his conclusion as to the nature and effect of the certified copy of the report of the board of canvassers. Mr. Justice Burke seems to be of the opinion that the record shows that such canvassers actually reported that the total number of votes cast upon the proposition was 1,817. He almost goes so far as to intimate that that report should be conclusive in mandamus proceedings. I, on the other hand, am of the opinion that the showing is merely that 1,817 votes were returned by some of the precincts, and that there were still outstanding other precincts from which no returns had been received, and the vote from which had, therefore, not been counted by the canvassers. According to the case of *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706, the presumption is that votes were cast pro and con on this proposition in these precincts. To me, therefore, the record shows that there were a number of votes outstanding and uncounted. If this be so, the case is taken out of the rule laid down in *State ex. rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231, and *State ex rel. Davis v. Willis*, *supra*. There being no proof in the record as to how the vote stood in these unreported precincts, the presumption merely being that there was a vote, there is no showing that the proposition was carried by a majority vote, even of those who voted upon the particular Stevenson county proposition. The stipulation that 356 votes were cast, generally, in the omitted precincts, tends also to strengthen this conclusion.

I am quite clear that the relator has not proved his case, and personally I am of the opinion that § 168 of the Constitution requires a majority vote of all those who voted at the particular election upon the

county division propositions generally, and is not confined to a majority of those who voted on the Stevenson county plan. 15 Cyc. 390; State ex rel. Peacock v. Osakis, 112 Minn. 365, 128 N. W. 295; State ex rel. Cope v. Foraker, 46 Ohio St. 677, 6 L.R.A. 422, 23 N. E. 491; People v. Berkeley, 102 Cal. 298, 23 L.R.A. 838, 36 Pac. 591; Stebbins v. Superior Ct. Judge, 108 Mich. 693, 66 N. W. 594; Hogg v. Baker, 17 Ky. L. Rep. 577, 31 S. W. 726; Enyart v. Hanover Twp. 25 Ohio St. 618; State ex rel. Hocknell v. Roper, 46 Neb. 724, 61 N. W. 753. Such latter conclusion, however, is not necessary to my decision in this case.

BURKE, J. (dissenting). The first proposition to which I desire to call the attention of those persons interested in this case is that the views of Judge Goss in no manner constitute an opinion of this court, having been concurred in by but two of the five members. The only matter in which three members of the court agree is that the county of Stevenson did not receive a majority of the votes cast at the election. Although the syllabus has but two of the five members of this court back of it, and is repudiated by three members, yet it is set up as "by the court." The bar will probably realize, however, that a court holding that 1,006 votes are too few to be a majority of 1,817 will not agree that two is a majority of five.

With the conclusion reached by the majority I wish to take issue, and at the start will say that the views of Judge Goss do not, in my opinion, correctly state the facts. To my mind the issues are simple and the conclusion plain. There was an election in 1908 upon the creation of Stevenson county. The canvassing board of McLean county, under their oaths of office, made a return that there was 1,817 votes cast upon Stevenson county, of which 1,006 were for the new county and 811 against. This statement is stipulated to be true by the attorneys, and a certified copy thereof is in evidence. This finding of the said canvassing board has never been questioned by contest, as required by §§ 693-695, Rev. Codes 1905, and after the time wherein such contest must be taken the said finding became conclusive upon all persons concerned. However, the county auditor of McLean county neglected and refused to make the proper returns to the secretary of state as required by § 2330, Rev. Codes 1905, and this action was brought in

mandamus to compel him to do so. To this action the county auditor had a right to reply, showing that the election itself was void, or that the law upon which it was founded was unconstitutional, or that the canvassing board was not even a *de facto* body, or that the returns made were forgeries; but he had no right to reply that the vote was not correctly canvassed, for two very good reasons: First, the time for contest had gone by, the ballots were already destroyed, and no bond or notice had been given, and leave of court had not been had; second, the auditor was not a party interested in the election, and his attack was therefore collateral. It is very plain to me, therefore, that the statement of the canvassing board must prevail as to the figures returned by it. The views of Judge Goss would probably be appropriate if someone had started a contest, but this was not done.

As a matter of fact the auditor did attack the election as void, and succeeded in getting this court to hold with him once (see *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701), but in another appeal it was shown that the court was wrong (see *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282) and it is now conceded by all members of this court that the election itself was valid. As a second ground of attack upon the new county the auditor asserted and proved that six of the fifty-one precincts of McLean county made no return upon this proposition. It does not appear that any votes, either for or against the new county, were cast in said missing precincts, although it is admitted that, upon other matters, there were cast enough votes that, had they all voted against Stevenson county, it would have been defeated. This attack and this proof are, to my mind, excluded because not brought by contest, and such is the holding of this court in at least seven cases (*State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 36, 49 N. W. 164; *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025; *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234; *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231; *Dean v. Dimmick*, 18 N. D. 397, 122 N. W. 245; *Chandler v. Starling*, 19 N. D. 144, 122 N. W. 198), and is also the views taken by the recognized authorities. See 26 Cyc. 257; 19 Am. & Eng. Enc. Law, 2d ed. 769; McCrary, Elections, 358-599; Spelling, Extra. Rem. 55-60; Merrill, Mandamus, 180, and the hundreds of cases therein cited.

The gist of these decisions being that, while the abstract of votes (or certificate of election) stands, it is binding as to what appears upon its face. 15 Cyc. 387, says: "A certificate of election, whether rightfully or wrongfully given by the board of canvassers, confers upon the person holding it the prima facie right to the office, and must stand until it is set aside by a competent tribunal in a proceeding in which its validity may be directly inquired into. It is conclusive in all cases in which its validity is not drawn directly in question." And at 26 Cyc. page 255, it is said: "It is a general rule that title to office cannot be adjudicated on an application for mandamus." And, again, at 15 Cyc. 386: "So, where some . . . proposition is submitted to the vote of the people, it is the duty of the canvassers to issue a certificate declaring the result of the election. This certificate or statement carries with it a like force as a certificate of election furnished to the successful candidate for office, and it makes a prima facie case of the correctness of the matters therein contained."

Indeed so well settled is the law that my associates seek to avoid its consequences by saying that no complete canvass of the votes was had, and that therefore there is no certificate of the canvassing board in existence. This they assert in the teeth of the stipulation of the attorneys that Exhibit D is a true and correct copy of the original abstract of votes made by the proper officers, and in the teeth of the certified copy of the said abstract of votes duly stipulated into the record. To me it seems that the trouble with Judge Goss is that he has gotten the idea that certain parts of Exhibit D relative to the total number of votes cast in the county is a certificate made by the county auditor, and not by the canvassing board. He is led into this error, because the auditor happened to be the official who made the certified copy of the record of the canvassing board. As a matter of fact, however, Exhibit D is stipulated by the attorneys to be a correct copy of the returns made by the canvassing board, and contains the following extracts: "Total number of voters who voted at the general election on November 3d, 1908, 3,600. Vote cast for governor 3,437; vote cast on *Stevenson county* 1,817." If my associates just comprehend that this is a statement made by the canvassing board, who are all acting under their oath of office, I think the fallacy of their position would become apparent to them. When it is remembered that this is a solemn statement or finding of the

canvassing board, and that it has never been attacked by contest, and has become a finality binding upon all parties concerned, it will be seen that the relator has proven by the only competent evidence in existence that Stevenson county has received a majority of the votes cast upon that proposition. In the case of *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231, a somewhat similar situation arises. Some 258 votes cast by women for the office of superintendent of schools of Walsh county were omitted from the official canvass made by the precinct officers, and it was positively shown that had these votes been counted it would have changed the result, yet because a contest was not taken this court refused relief, and says: "The board is required to act upon the official returns only, and not upon matters lying outside of them. If the returns are false,—and in this case it would seem they were, through the innocent mistake of the precinct officers in not including the women's vote in their official statement of the election, they could have been overturned by appropriate proceedings to contest the election. But until the prima facie character of the official returns is destroyed in proper judicial proceedings, they determine the result."

For the sake of argument, we can admit that six precincts did not make any returns to the canvassing board. That fact does not appear upon the face of the returns, but is proven by evidence which was only admissible in a contest case. The canvassing board had certified that there were 1,006 votes for Stevenson county,—811 against it, and a total vote of 1,817 cast thereon. This negatives any presumption which might otherwise arise that there were in fact votes cast upon this proposition in the six missing precincts. Thus, it will be seen that an attempt has been made here to change this mandamus suit into a contest suit without the necessity of having any person start such contest. Sections 693-697, Rev. Codes 1905, sets out the procedure necessary to contest the election of a new county as follows: "In any county where there is a vote for . . . changing the county lines thereof, any elector of such county on leave of the district court may contest the validity of such election . . . such elector shall give notice in writing of such contest to the county commissioners or a majority of them, of the county in which such vote was taken, by serving a notice . . . within thirty days after the result of such vote is canvassed. Such notice shall specify the grounds of such contest, and shall be filed with

the clerk of the district court within ten days after the service thereof . . . the county commissioners of such county shall appear and defend such contests, but in case they fail to appear and defend the same any elector of such county may at any time before such trial, on leave of the court, appear and defend the same. . . ." Sec. 695: "Any person bringing a contest under the provisions of this article must, before bringing the same, furnish good and sufficient surety for costs, as provided in the Code of Civil Procedure." It stands to reason that where the legislature has made such full and careful provisions for contesting the election, that it was not intended that these provisions might be ignored in a mandamus suit. While the defendant might show any facts attacking the validity of the election itself at any seasonable time, yet any attack upon the figures found by the canvassing board must be by contest. The case of *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958, relied upon by defendant, does not bear out his contentions. In that case the figures returned by the canvassing board were not attacked, but it was claimed they showed upon their face that Hillsboro did not have two thirds of the votes polled. There is a vast difference between attacking the election itself and the returns of said election. In the case at bar the defendant, if he did not wish to accept the figures of the canvassing board, had several remedies. He could have mandamusd the board to reconvene and count the missing precincts, or he could contest the election. In either case he would have had to appear ex rel. the state, so that all of the citizens of his bailiwick would be bound by an adverse decision. See *Dean v. Dimmick*, 18 N. D. 397, 122 N. W. 245; *State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 36, 49 N. W. 164. In either event he would have to act promptly while the ballots were still preserved. He would have to give proper notice to all parties interested, and put up a bond for costs. Having done none of these things, and the time for contest having expired, and the ballots having been destroyed as contemplated by law, and a fair trial being no longer possible, then the defendant must be presumed to have accepted the return of the canvassing board as final. In *Chandler v. Starling*, 19 N. D. 144, 122 N. W. 198, this court said: "It is proper to try in mandamus proceedings all questions relating to the prima facie title." In *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025, it is stated: "The defendant,

a private citizen, has no status which entitles him to become the champion of the state;" and again in the same case: "In our view this investigation is inhibited by the rule that forbids the trial of title by mandamus."

It will thus be seen that Judge Goss's idea that this action is brought to determine the result of an election, which is found in the opening sentence of his opinion, is entirely erroneous. This action was not brought to determine the result of the election. It was brought to compel the county auditor to do a ministerial duty after the voters had determined the election.

Judge Bruce has not concurred in the reasons given by Judge Goss for holding that no canvass had been made of the votes in McLean county; but he joins in the reversal in this case for the reason, which he alone maintains, that it was not shown that Stevenson county had received a majority of all the votes cast upon all county division propositions. It is conceded there were presented to the voters at the same election three different propositions to create new counties, and that upon the three different propositions there were more than 2,012 votes cast. This, however, is but another phase of the old contention that a proposition of this kind must receive the affirmative vote of a majority of all the voters who attend the polls, whether they vote upon the proposition or not; and I did not know it was longer open to debate in the United States or North Dakota; since practically every court in the United States that has passed upon the question at all has held that, where language like our Constitution and statute is used, the majority of all votes cast means a majority of all votes cast upon the proposition under discussion. In North Dakota alone the proposition has been passed upon at least six times. State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; State ex rel. Larabee v. Barnes, 3 N. D. 319, 55 N. W. 883; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360; State ex rel. Davis v. Fabrick, 18 N. D. 402, 121 N. W. 65; Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95. Practically all of the cases in the United States are collected and digested in a note at page 478, vol. 22 L.R.A.(N.S.), which note surely must have escaped the attention of brother Bruce. From these cases it appears to be well settled that when a voter refuses or neglects to cast his vote upon a proposition of this kind, that he is presumed to have delegated

to the voters who do vote all of his rights of choice. In most of these cases it is merely claimed that the proposition must have a majority of votes cast upon governor, or some other single proposition. Brother Bruce goes even further, and says that this proposition must not only have a majority of the votes which may be cast for governor, but also a majority of all votes cast upon three different propositions. If his views are correct, instead of the voter who has expressed no choice on Stevenson county being deemed to have waived his right to vote, he is held to have voted against Stevenson county.

The decision of the majority in this case in fact holds that 1,006 votes is not a majority of 1,817 votes, and these are the mathematics used to disfranchise the entire electorate of one of the largest counties in our state, and I respectfully decline to become a party to such a procedure.

On Petition for Rehearing.

Goss, J. It is urged on rehearing that, because written exceptions were not taken and filed to the findings of fact and conclusions of law, the same are conclusive, and the court cannot examine a stipulated record, embodied in a settled statement of the case, in which specifications of error of fact and of law challenge both the conclusions and the findings. Such may have been the common law, but we construe the statutes as abrogating any necessity for taking and filing exceptions in findings in appeals such as this. Section 7053, Rev. Codes 1905, defines an exception as "an objection upon a matter of law to a decision made either before or after judgment by a court in an action or proceeding." This definition confines an exception to "an objection upon a matter of law," and manifestly an objection that a finding is not in accord with or supported by the facts disclosed by the evidence cannot amount to an exception. Under the statutory definition of an exception, there cannot be such a thing, in a legal sense, as an exception to a finding of fact, on the ground that it is contrary to the evidence; and this alone is sufficient to show that no exceptions to findings of fact can be taken or are necessary. For example, § 992 of the New York Code of Civil Procedure was in such respect nearly in the language of § 7053, Rev. Codes 1905. And it was held that the

effect of said § 992 was to obviate the necessity of excepting to findings in order to review the evidence upon which the findings were based. But § 993 of the New York Code further provided that when the assignment of error was that the finding had no evidence to support it, then it was a ruling upon a question of law, and it was necessary that there be an exception to raise such question of law; but exceptions were not necessary where there was some evidence to support the findings, and where the error assigned was that the finding was against the weight of the evidence. *Meade v. Smith*, 28 Hun, 639; *Hill v. White*, 46 App. Div. 360, 61 N. Y. Supp. 515; *Porter v. Smith*, 35 Hun, 118, affirmed in 107 N. Y. 531, 14 N. E. 446; *Bullock v. Bemis*, 3 N. Y. Supp. 390; *Mooney v. Fagan*, 4 N. Y. Supp. 21; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516. But this distinction has not been brought into the practice in this state, as we have no section parallel to § 993, creating such distinction. An exception cannot, and need not, be taken to a finding.

Then again, under § 7053, "the exception must be taken at the time the decision is made, except as provided in § 7054," which reads: "The verdict of the jury, the final decision in an action or proceeding, . . . are deemed to have been excepted to, and the same may be reviewed both as to questions of law and the sufficiency of the evidence upon motion for new trial or upon appeal, as fully as if exception thereto had been expressly taken." Under § 6717 the word "verdict" in § 7054 must include "not only the verdict of a jury, but also the findings upon the facts of a judge or of a referee appointed to determine the issues in a cause." And again, under § 7040, findings and conclusions amount to a decision. It reads: "In giving the decision the facts found and the conclusions must be stated separately; judgment upon the decision must be entered accordingly." So that under the express terms of § 7054, whether the word "verdict" be considered as including findings, the decision mentioned in § 7054 is the findings under § 7040. Exceptions are unnecessary, and, by the terms of the statute, the sufficiency of the evidence may be reviewed "upon appeal as fully as if exception thereto had been expressly taken." We find §§ 7053-7054 coming to us from territorial times, and still remaining the statute of South Dakota as well as of this state. For South Dakota's interpretation in line with the foregoing, see *Smith v. Commercial Nat. Bank*, 7 S. D. 465, 64

N. W. 529; Lone Tree Ditch Co. v. Rapid City Electric & Gaslight Co. 16 S. D. 451, 93 N. W. 650; Kelly v. Wheeler, 22 S. D. 611, 119 N. W. 995; State ex rel. Koontz v. Brown, 25 S. D. 74, 125 N. W. 294. Companion sections to those of our Code involved are quoted and discussed in these cases. It is plain, therefore, that under our statute an exception can be taken only to errors of law, and then only with respect to matters not mentioned in § 7054, wherein findings and other orders are by statute deemed excepted to. The only condition precedent to review the sufficiency of the evidence to justify the findings is that a statement shall be settled, embodying all the evidence, and contain "a specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision," as required in § 7058.

Section 7226, prescribing the powers and duties of the supreme court on appeal, is in strict harmony with the foregoing provisions. It provides that upon appeal from a judgment the supreme court may review any intermediate order or determination of the court below "which involves the merits and necessarily affects the judgment, . . . whether the same is excepted to or not;" also errors apparent on the judgment roll itself may be reviewed without exception or a statement of the case; "any question of fact or law, decided upon trials by the court or by a referee, and appearing upon the record properly excepted to in a case in which an exception is necessary, may be reviewed by the supreme court, whether a motion for a new trial was or was not made in the court below," but excluding jury trials from such review. The appellate court is thus explicitly empowered to review the sufficiency of the evidence to justify findings of fact in cases tried by the court and without a motion for a new trial. There is no necessity for an exception to secure such review, as no exception is provided for, and, strictly speaking, none can be taken to the findings; and this fact is recognized by § 7226 in the language: "Properly excepted to in a case in which an exception is necessary;" stating plainly that an exception is not necessary in certain cases.

Respondent urges that § 7226 was adopted from the Wisconsin statutes, and cites many Wisconsin authorities that findings of fact and conclusions of law cannot be reviewed without exceptions. A comparison of the Wisconsin statute, § 2870 of Sanborn's and Berryman's

Anno. Stats., enacted in its present form in 1860, with our statute, discloses no similarity, but on the contrary that the Wisconsin statute in express terms requires an exception to findings. It reads: "In any trial by the court an exception taken at the trial may be settled as in trials by jury under the preceding section, and either party may except to any findings of fact or conclusions of law in the decision of the court by filing written exceptions with the clerk at any time before the expiration of ten days after service upon him of a written notice of the entry of judgment thereon. All such exceptions may be incorporated in the bill of exceptions which may be thereafter settled." The Wisconsin holdings are none of them in point on our practice under § 7226.

Respondent claims that the finding as to the number of votes cast for and against county division is plead by defendant's answer to have been 1,006 for and 811 against, and that by defendant's answer he has admitted that 1,817 votes were all the votes cast on said proposition in said county at said election. It is true the answer contains the allegation that "out of 3,600 voters voting at said general election, 1,006 votes were cast in favor of the county of Stevenson, and 811 votes were cast against the proposed change; and that upon the question of the proposed changes to be effected in the boundaries of the county of McLean there were 2,700 votes cast; out of which the proposed change for the formation of Stevenson county received 1,006 votes in favor of the formation thereof." This is said in connection with the defense plead, in effect that granting that a majority of the votes cast upon the Stevenson county proposition were cast for the creation of that county, no county division could be had without a majority of all votes cast on all county division propositions favoring the creation of Stevenson county; in which event about 1,800 votes would have had to have been cast for Stevenson county to create it, inasmuch as at the same election the creation of Sheridan county was voted upon. When this paragraph of the answer is considered with the alleged defense in connection with which it is plead, it cannot be said to constitute an admission that 1,817 votes were all that were cast in said county. Especially is this true when we find in the answer the following allegation: "Defendant, further answering, alleges that the entire vote on the question of county division was never returned to or canvassed by the county board of canvassers of McLean county; that although in each of the precincts of

Butte, Douglas, Roseglen, Whitaker, Shell Creek, and Turtle Lake, of the county of McLean, votes were cast on the said question of county division, no return from said precincts of said vote was made to the board of county canvassers, and the aggregate number of electors who voted in said precincts at the said election was 354." This expressly negatives any inference respondent would have drawn to the contrary from the pleadings.

On the trial it was stipulated "that all the requirements of the election law were fully complied with other than as set forth in these stipulated facts." Among the stipulated facts we find it is stipulated that no returns on this county division proposition "were ever made to the board of county canvassers" from the six precincts in question, in which 354 electors voted at said election. Upon this respondent contends that the presumption that "a duty imposed by law has been regularly and duly performed," aided by said stipulation, should compel us to conclude that notwithstanding the stipulated facts as to the returns from these six precincts, all county division ballots cast on this division have been canvassed and returned, and the presumption should be that no ballots were cast in these six precincts upon county division. To reach this conclusion we must ignore stipulated facts that no returns were made from these precincts, and assume to the contrary that returns were made and were counted. The answer pleads exactly what was subsequently stipulated at the trial in this respect; and the stipulation must be taken not only as proof of the facts stipulated, but as a judicial admission made in the course of a trial of the truth of the paragraph of the answer pleading such facts. Certainly a mere presumption of fact, arising from a presumption of duty performed, is overthrown by proof inconsistent with the application of any such presumption.

Respondent labors heavily with the burden of proof. He states that "it is of course elemental that in the first instance the party having the affirmative must assume the burden of proof to establish the essential allegations of his pleadings, that is, to present to the court the facts entitling him to recover." This we agree has the support of reason and authority. He next asserts: "The vital, essential fact necessary for the relator to establish was that the canvassing board ascertained and determined the result, and that the result showed a majority in favor of division." We agree with this assertion. So far we are on common

ground. We differ only as to the method of proof under such assumed burden. The result that the canvassing board was to ascertain and determine was the number of votes cast throughout the county on the county division proposition, not the result of the election, as that is a deduction to be drawn from the facts to be ascertained from the return and abstract of votes of the canvassing board. *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, at page 137, 86 N. W. 231. With the burden of proof concededly upon relator to establish the facts from which the conclusion that county division regularly carried at said election must be drawn, he introduces proof claimed by him to be *prima facie* proof as to returns from and the vote cast in all of the fifty-one precincts in said county; and then stipulates that the proof so offered really covers but forty-five of the precincts of said county, thereby destroying the *prima facie* force of the documentary proof as to the whole county; but he singularly still maintains, notwithstanding his stipulation and contrary to the facts so stipulated, he has made proof as to the vote of the entire county on such question. Again, apparently realizing that a *prima facie* case has been made as to only a portion of the county vote, he asks us to indulge in a presumption based upon the presumed regularity of official conduct that the entire county vote is presumed to have been canvassed; to indulge in which presumption we must ignore the above stipulated facts which show no canvass was or could be made of the entire county vote. Under the facts established conclusively by his own stipulation, neither the respondent, nor this court, nor any member thereof, can say that this county division proposition received a majority vote favoring it.

With due deference to the opinions of the dissenting member of this court, Justice Burke, his conclusions must ignore such stipulated facts when he agrees with the contention of respondent concerning and contrary to admitted facts, and is ready to find that this county has been constitutionally created, when the parties stipulate that but less than seven-eighths of the number of precincts in the county have been canvassed, and no proof is offered as to how the 354 voting electors in such omitted precincts voted on this question.

And this leads to a word upon the assertion of counsel for respondent, and the two dissenting justices of this court, that in deciding this case we have overruled much of the established precedent of this state.

The so-called special concurring opinion of the chief justice is placed solely upon the holding in the Meyers Case, in which he joined, and he here intimates doubt as to the correctness of that decision by his statement: "I am by no means certain that I should now concur in the holding in that case, if the same questions were being considered in the first instance." The writer will term his concurring opinion as a dissent. Attention is called also to the following statement contained therein: "While it is not stated in the opinion of Judge Goss that other cases should be overruled, it seems to me that it in fact, if concurred in by a majority of the court, would overrule numerous well-considered authorities, including *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706; *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231; *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360; and *State ex rel. Johnson v. Ely*, 23 N. D. 619, 137 N. W. 834, and perhaps others. If it is the intention to overrule these authorities, I think it should be so stated in the opinion, and thereby prevent the confusion which necessarily follows whenever an opinion is in effect overruled without so stating." The bar would infer from this perhaps an intent on the part of the writer, and possibly a majority of the court, either to intentionally overrule these cases cited, without expressly so stating, or that the cases cited are unintentionally overruled because the holdings were not examined or considered. Notwithstanding the statement of the chief justice, we here desire to state that these cases have all been considered and discussed in conference, and to the knowledge of the chief justice, long before he filed his opinion. But he has the right to state his belief that these cases are in effect overruled. We therefore will examine them to show the error of the statement, and to prevent the majority opinion from misleading the bar as it has apparently confounded the chief justice.

State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706, alleged in the dissents to be overruled, is cited in the main opinion in support of our holding. In that case the abstract of votes involved was a complete one, covering all precincts in the county, instead of being, as here, but a partial abstract of the county vote. And said abstract was sought to be impeached in mandamus proceedings, the moving papers of which charged that the county board of canvassers compiled the abstract from unofficial documents or improper precinct returns. The fact that the

opinion is based upon the proposition that the basis for the abstract may be considered to determine its validity is in effect a precedent for our holding, instead of antagonistic thereto. But that decision was placed upon the grounds that, conceding the official returns were not used, there was no showing that the result of a recanvass from official returns would be different; and in fact it was conceded that the abstract, from whatever compiled, was correct; and, further, that it had been already adjudicated as correct in the prior case of *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, as the following from the last page of the opinion plainly states: "Being a citizen and taxpayer of Ward county he (relator) was constructively a party to the certiorari proceeding, and had the right to be heard and [with the right] to have any question pertinent to the issues litigated in that proceeding adjudicated. He remained silent while the attorney general, acting as his representative, admitted the correctness of the result shown by the abstract of the vote of the county commissioners; and only when it has been decided that such result, if correct, establishes the status of Mountrail county as an existing county of North Dakota, does he attempt to bring a proceeding that can be maintained only upon a showing that the result is the reverse of what the representative of the public interest has admitted it to be. This point once litigated the public interest requires that it should be at rest." Nothing in that decision can conflict with our holding here.

State ex rel. McCue v. Blaisdell, supra, above referred to, also claimed by the dissent to be overruled by our holding, was a mandamus proceeding wherein the propriety of the remedy was not involved, nor was there in issue a single question of fact. That opinion was written by the present chief justice. It discloses that the question for determination was whether an affirmative majority vote of all electors in the county voting upon county division was sufficient to constitutionally authorize county division. One side claimed such a majority was all that was necessary, while the opponents of division asserted that a majority of all electors voting on any proposition before the electors at such election was necessary before division was constitutionally carried. The decision of this point decided that case. There was no question of fact raised; it was conceded that a majority of those voting on county division favored the division, but that such majority would not amount to a ma-

jority of all electors voting at such election. The dissents say we have overruled this case. In the main opinion, we expressly state that we do not pass upon that question. This is but another illustration of the inaccuracy of such assertions. It is difficult to see any reason for such statement in the dissents.

Another case we are charged with overruling is *State ex rel. Johnson v. Ely*, 23 N. D. 619, 137 N. W. 834. That case decided a county-seat controversy between Bowbells and Lignite. It is cited in our main opinion as authority on one phase of our holding. It too was a mandamus proceeding, arising out of the action of a county canvassing board in casting out and refusing to include in their official canvass of a county-seat election several precincts in which the voting places therein, where the election was held, were considerably distant from the established voting places previously located by the board of county commissioners. This is in no wise a parallel question to any here involved. It was there held that the county canvassing board might take judicial notice of the locality of the designated voting places, and when the returns clearly indicated that an election was held at a point distant from such designated place, the board was justified in declining to canvass such returns; and, further, that the trial court properly "inquired into the facts, and finding that on a contest of the election there would be no justification for changing the certificate, declined to issue the writ," inasmuch as the writ of mandamus is not a writ of right. This holding is authority for the consideration of testimony in this case to determine whether judicial discretion shall be exercised in favor or against the creation of the new county, and that to receive testimony for such purposes in a mandamus case does not constitute, as Justice Burke avers it does, a contest of an election. And, again, we find the statement in the special concurring opinion of the chief justice at variance with the facts, when he says we have overruled this case. And it is significant that the opinion in *State ex rel. Johnson v. Ely*, referred to, also written by the chief justice, has been filed during the time this case at bar has been before this court for consideration, and since it was argued and submitted fully on the merits.

Again, *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231, is likewise said to be overruled by our holding. The question involved in that case is stated in the opinion to be: "Briefly stated the

question, and the sole question in this case, is whether the statements of election, or the tally sheets found in the poll books, govern the canvassing board in the performance of their duties. If the board could only consider the statements of election, then their canvass was both regular and correct and the judgment of the district court in this case was erroneous. If, on the other hand, the tally lists constituted a part of the returns, and were properly before the board as furnishing a basis for their canvass, then there was a legal duty resting upon the board to consider them. . . . What constituted the returns is the important question in this case," and the holding is thus summarized: "The purpose in furnishing the tally sheets was, without doubt, merely to provide a convenient place for noting the votes, for the purpose of computation as they were canvassed. That canvass, as we have seen, is required to be made by the inspector and judges, and the result announced publicly, and then committed to the written statement of the election. This statement and the poll book are the only documents constituting the returns, and the canvass by the county canvassing board is plainly confined thereto." Notice that the opinion expressly states that the canvass was regular and correct, and hence presumptively made upon returns from all of the precincts in the county. In the case at bar the attorneys stipulated facts which show that six precincts out of fifty-one in the county must have been omitted from the canvass, because no returns from said precincts were made, and hence could not have been before the canvassing board. And, as stated in the main opinion, opposite these six precincts, identified by name, are blanks upon the so-called abstract of votes by precincts, which instrument on its face shows its incompleteness, and that it is but the partial return of the vote on this question in that county, to supplement which as to facts the parties stipulated that 354 voters voted in such omitted precincts at said election, and no return from six precincts has been made. The case before us is in no wise parallel in facts or in law to *State ex rel. Sunderall v. McKenzie*, *supra*, and is not in any particular overruled by our holding. In fact, our construction of the facts in the *McKenzie* Case seems the same as that adopted by Justice Burke in writing the opinion in the recent *Billings County division case, Pederson v. Billings County*, 23 N. D. 547, 137 N. W. 484, decision of which has been filed since this case has been under consideration before this court. We have carefully examined all

of the other cases mentioned in the dissent of Justice Burke, and we fail to see how anything contained in any of them is overruled. Instead, the syllabus of *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958, reads: "Mandamus to compel the county officers to hold their offices at the county seat is the proper remedy to determine whether the county seat has been legally changed." Whereas, if the principles applying to a county division election are analogous to those applying to a county-seat election, that case is authority against Justice Burke's conclusions, that to determine in mandamus the fact of whether the election has carried by the required majority is to contest an election by mandamus. It would seem that this case supports our conclusions, instead of his.

He also charges us with overruling *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234. An examination of page 383 shows this to be unfounded. That case is followed and furnishes precedent for our holding, in so far as it touches upon matters analogous to those here involved. That was an application for the exercise of the original jurisdiction of the supreme court by a writ of mandamus. The remedy was challenged. The court says: "The only question left relates to the remedy. The relator, having received the appointment and having qualified, is in a position analogous to one who holds a certificate of election and has qualified. This *prima facie* title gives him the right to the office pending any investigation as to the ultimate title; the defendant not being as to him even a *de facto* officer, but holding the office without so much as a color of title. That it is proper to try in mandamus proceedings all questions relating to the *prima facie* title is not open to debate in this state, since our decision in *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025," another case said to be overruled. Turning to the report of *State ex rel. Butler v. Callahan*, at page 492 of the state reports, we read: "In our judgment the better rule is that in cases like this nothing can be tried except such questions as affect the *prima facie* title of the relator," and the court properly refused in a mandamus proceeding to investigate the respondent's qualifications to hold the office where concededly the relator held an admittedly valid certificate of election to office, and had duly qualified for that office. Such legal and valid certificate constituted title to the office, and valid title to the office could not be overthrown in mandamus, as

such is the purpose of office contest. But here, for *State ex rel. Butler v. Callahan* and *State ex rel. Moore v. Archibald* to be applicable, it would be necessary to concede that the abstract of votes by precincts was regularly issued upon returns from all precincts in the county, instead of a part of them only, that it might constitute a *prima facie* return as to the entire county. If such were the facts before us, we would agree on this point with Justice Burke's contention. The trouble with his views is that he gives undue prominence to an uncertain statement contained in a summary of the board as to the county vote, and begs the whole issue involved when he does so, and refuses to consider the fact that the abstract by precincts is incomplete on its face, and that it is stipulated by counsel, without objection thereto, and an uncontroverted fact in the record, that the piece of proof he would adopt as *prima facie* proof of the whole election is but proof as to a portion of the precincts of the county, and is impeached by facts appearing upon its face and facts stipulated in the record based upon allegations of the answer. An examination of the other cases cited in his dissent discloses that none of them are applicable to the facts before us, and therefore none of them are overruled.

In said dissent he also takes the peculiar position that because this mandamus proceeding is brought against a public officer, in the name of the state, on relation of an individual, and purporting to be in behalf of many citizens interested, that an answer denying the facts alleged by relator, and supplemented with matters purely of defense to the writ, must by some mysterious process of reasoning be considered as a contest brought by the answering defendant against the relator instituting the suit; and because the party defendant could not contest in his own name, he should not be permitted to defend a mandamus proceeding, because to defend would be to contest. This seems queer doctrine. The fact must be admitted that no contest is created by the answer. A denial of the necessary averments of complaint cannot constitute the commencement of an action, proceeding, or contest. The issue of fact merely is thus joined, and relator put upon his proof, whereupon he offers an alleged *prima facie* conclusive piece of evidence, the abstract. The court examines it, following *State ex rel. Moore v. Archibald*, and *State ex rel. Butler v. Callahan*, to ascertain by whom it was issued, upon what it was issued, and to determine in fact and law its legal

force as proof of the count of the ballots cast at that county-wide election, and discovers that this document is incomplete on its face, whereupon counsel stipulate facts reducing it to but prima facie proof as to but a portion of the vote of the county; and then, after all this, counsel for relator and the dissenting justice of this court aver that, to so examine and consider and give proper force to the evidence, documentary and stipulated, is to contest an election in mandamus. Further comment is needless.

This review of the case, after the filing of the petition for rehearing, is made that counsel filing it may feel that all matters presented by it have been considered. The importance of the litigation demands full explanation of our reasons for the holding; and the charges, to our minds ungrounded and made without consideration, that we have overruled particular and established precedent with or without consideration, justifies our review of the authorities to establish the contrary, that we may "thereby prevent the confusion which necessarily follows whenever an opinion is in effect overruled without so stating," quoting from the special concurring opinion of the chief justice.

On petition for rehearing, respondent questions the propriety of the dismissal of this action, contending in line with the suggestion contained in the opinion of the chief justice that the case should be remanded for further proof. To do so would be the equivalent of assuming that the result of the election could be established by competent proof at this late date. The authorities announce the rule that the result of an election may be established by other evidence than the returns, ballots, and election records, where from any cause such record evidence becomes incompetent or unavailable as evidence. 5 Enc. Ev. 69. But this general rule must be subject to some qualification as to time. McCrary, Elections, § 477, quoting *Archer v. Allen*, 1 Bart. Elect. Cas. 169. It cannot now be seriously contended that the ballots used in this election are still admissible as evidence. The sixty-day period prescribed by statute, during which they must have been kept, and when so kept were primary evidence, elapsed four years ago, and with the termination of that period ended their evidentiary value. "When ballots are still in existence and have been kept as required by law" they are admissible. Cooley, Const. Lim. p. 625; McCrary, Elections, § 480. "But the right to have recourse to the ballots presupposes that they

have been kept as required by law; that the guards thrown around them have been preserved, and that they still exist in the same integrity as when cast." Mechem, Pub. Off. § 229. Manifestly all election records in the various precincts, even if in existence, must be of but questionable value and of doubtful importance, even though verified by the testimony of the precinct officers themselves, as such time has elapsed that there is no means of verifying or challenging the truth of any such records as would have existed had they been offered within the period during which the ballots themselves could have been admissible. And what is true as to these records applies to the oral testimony of any election officials. To receive such evidence at this time, after two intervening elections, the necessity for which arises because of the dereliction of duty in making returns of said matter at the time of election, and while the statutory safeguards from which to verify or impeach the returns were in existence, must at the best leave any result, declared upon such evidence, still surrounded with uncertainty. The result of this election might actually turn upon the testimony of the election officers of a single precinct concerning so important a matter as the creation of a new county, and with the witness testifying with full knowledge of the number of votes necessary to defeat or create such result. To hold such testimony admissible would be in effect to permit the witness to cast not his own vote alone, but the vote of the precinct on such question. And this, too, when we find the importance of an election upon such a question to be greater than the ordinary election, as is emphasized by the existence of a constitutional provision upon county division elections while the ordinary election matter is not there touched upon. To receive testimony of this class as proof at this time would, we believe, be contrary to the spirit, if not the letter, of our election laws, the primary purpose of which is to so prescribe the manner of ascertaining the result of an election and so surround with safeguards the canvass of such result, with time limits to insure promptness, as to insure the determination of the election result with practically absolute certainty; and all to the purpose that the expression of popular will shall not depend upon even the canvass or oath of one individual election officer. It is thus manifest that the election laws themselves, probably from the experience had emphasizing their necessity, are framed against the possibility of fraud, thereby recognizing that without such safeguards frauds may be

perpetrated in the thwarting of the public will as ascertained by the ballot box. With this in mind the following comment from *Oakes v. Finlay*, 5 Ariz. 390, 53 Pac. 173, at page 176, would be particularly applicable to proof taken at this time concerning an election held over four years ago: "It is deemed unwise to lay down any rule by which the certainty and accuracy of an election may be jeopardized by the reliance upon any proof affecting such results that is not of the most clear and conclusive character. The temptation to actual fraud and corruption on the part of the candidates and their political supporters is never so great as when it is known precisely how many votes it will take to change the result. And men who are willing to sell their votes before election will quite as readily sell their testimony afterwards, especially as the means of detecting perjury and falsehood are not always at hand until after the wrong sought to be accomplished by it has become successful and the honest will of the people has been thwarted." Consult also *Stafford v. Sheppard*, 57 W. Va. 84, 50 S. E. 1016; *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867; *Savage v. Umphries*, — Tex. Civ. App. —, 118 S. W. 893, at page 903; *Weakley v. Wolf*, 148 Ind. 208, 47 N. E. 466; 50 Cyc. 420. And, besides, respondent has had ample opportunity to offer testimony on trial had the same been available; and the attempted perpetuation by respondent of any such testimony is contrary to the theory upon which he has tried this proceeding. He has contended that the abstract in question was *prima facie* proof of the entire election, and relied upon the same as the only proof necessary to establish the entire vote cast at such election. We can see no reason for remanding this case for further proceedings, notwithstanding that in the opinion of the chief justice to do so would be "the manifestly equitable and just disposition of this proceeding, which I suggest."

The petition for rehearing is denied, and we adhere to our decision.

BRUCE, J. I now and after the petition for rehearing concur both in the above opinion and in the opinion chief by Mr. Justice Goss.

BURKE, J. (on rehearing). My dissent heretofore filed expresses my sentiments regarding this case. When such dissent was filed the original opinion had been concurred in by but two justices of this court, but since that time Justice Bruce has expressed himself as favoring the opinion

as well as the result, so that said opinion is now entitled to record. I make this explanation because of the portions of my first dissent which refer to the fact that at that time two justices were establishing or attempting to establish an opinion of this court.

SPALDING, Ch. J. When my opinion was written in this case only two members of the court had joined in what now seems to be the majority opinion. That opinion had awaited the concurrence of a third member for many weeks, and such concurrence then seemed out of the question, as did any agreement of any three judges on anything more than the result; and for that reason I did not deem it necessary or proper to more than call attention to some of my reasons for not concurring fully in the great number of questions attempted to be passed upon. The statement that the decisions in the cases referred to are not overruled probably settles that as a fact, but interested litigants may not so regard it. It is wholly immaterial, as I view the question, whether a case is overruled or not, as an abstract proposition; but it is highly important that the construction of a law be settled when it is in question, and that there be some degree of stability in the decisions of this court; and if, as conceded, it is important that confusion be avoided the question of overruling a decision or not overruling it should bear analysis, regardless of any naked statement of the fact. I shall not add to the at least extraordinary length of the opinions in this case by submitting an analysis of the cases referred to, because by so doing it might give the appearance of the existence of an unseemly controversy in this court, which is not the fact. I will simply say that it seems to me that a too narrow interpretation is given to *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231. The facts were before this court and showed, or at least it was alleged and not in issue, that no returns were made of the women's votes for superintendent in certain precincts, and that had returns been made of such votes the result would have been changed. Notwithstanding this, the candidate, having a majority on the returns made, retained the office. There may be a distinction between partial returns from each precinct and complete returns from some precincts and none from others. It is true it was said in *State ex rel Davis v. Willis*, 19 N. D. 209, 124 N. W. 706, as quoted in the majority opinion herein, that "the reasonable presumption

is that an election being held in Ward county on the day in question and a proposition in which the people were generally interested legally presented to the electors for determination, votes were cast pro and con thereon in all of the election precincts of the county;" and that this presumption was stronger than the presumption that no vote was cast because no return thereof was made that could be officially recognized. But it was there held that it will be presumed that the result shown by the abstract already prepared is substantially correct, in the absence of an express allegation that the number of unreturned votes will produce a different result. And this latter presumption prevailed. In other words, the court held that while there was a presumption that votes were cast pro and con, the presumption that the result would not be changed prevailed in the absence of an express allegation that the result would be changed if a canvass of such votes were made. I omit all reference to those cases in which I wrote the opinions, for the reason already stated, and for the further reason that the meaning of language used in an opinion is often clear to the writer thereof when it is obscure to the reader. The members of the bar can judge of these decisions for themselves. I will, however, add that I did not intend to be understood as of the opinion that every proposition determined in the cases referred to was overruled, or that the same point was overruled in each case. The bar will now understand that this court still considers those cases authorities. I will bring this wearisome discussion to a close by the observation that I am of the opinion that a decision of the supreme court of the territory of Arizona at the time *Oakes v. Finlay*, 5 Ariz. 390, 53 Pac. 173, was decided, holding it unwise to lay down any rule by which the certainty and accuracy of an election may be jeopardized by reliance upon any proof affecting the results of an election, that is not of the most clear and conclusive character, for the reason that the temptation to actual fraud and corruption is so great when it is known precisely how many votes are necessary to change the result, and because men willing to sell their testimony after election would find opportunity to do so under such circumstances and thereby thwart the will of the people, need not necessarily be taken as an authority in this state. The character of the population in Arizona when that decision was reached was such as to make it pertinent; the intelligence and character of the people of this state are such that dangers incident to

such a situation in that territory at that time have little bearing here at the present time. Hence that decision ought, in the absence of something to support an inference of fraud or contemplated perjury, to carry but little weight as an authority in this state.

BURGER v. SINCLAIR.

(140 N. W. 231.)

Advancement of cases for hearing — supreme court — discretion.

1. Though § 3758, Rev. Codes 1905, requires the supreme court, when due application and showing is made, to advance certain cases upon its calendar, in which the public has a direct interest, the arrangement of such calendar is otherwise entirely within the control and discretion of such court.

Appeals — supersedeas bonds — when furnished.

2. Where a perfectly solvent defendant and appellant in three cases raising practically the same issues neglected to file supersedeas bonds within the statutory period, though he directed his counsel so to do, either because such counsel thought the filing of such bonds was unnecessary under the statute, or that, on account of the solvency of all of the parties concerned, no levy would be made, or attempted to be made, before an affirmance of the judgments, and during the term of the supreme court for which the cases are set for argument, the defendant discovers not only that the plaintiffs are about to levy their executions, but that some of them have disposed of some of their property so that, in case of a reversal of the judgments, the recovery of damages for the unauthorized levies might be difficult and problematical, and makes application in the supreme court for leave to file supersedeas bonds therein, or to make any deposit of cash that may be required of him, which motion, on account of the strict wording of the statute, § 7208 (see *Burger v. Sinclair*, post, 326, 140 N. W. 235) is denied, and it appears to the supreme court that, by advancing the said cases on its calendar, they may be disposed of so that, if the said judgments are reversed, the levy will be unnecessary, and that said cases involve practically the same issues, such court may, in its discretion, advance such cases.

Function of court.

3. The function of a court is not to sit as an umpire between counsel, but to see that justice is ultimately done to the litigating parties, and that the administration of the law itself may be reasonable and without just subject for criticism.

Dismissal of appeal — order permitting undertaking to be filed.

4. An order which provides that "an appeal shall be dismissed unless the appellant shall, within twenty days from the date thereof, file with the clerk of the supreme court an undertaking for costs, in compliance with the statute, with sureties to be approved by the clerk of the district court, and that unless such condition is complied with within the time aforesaid, the appeal in said action shall be dismissed," is complied with if such a bond is filed and approved by the clerk of the district court within the time prescribed, even though it has not been filed long enough prior to the expiration of the twenty days to allow an exception to and justification of the sureties. Such holding, however, does not deprive the respondent of the right to insist upon such justification within the statutory time.

Sufficiency of bond — technical error.

5. Where, in an appeal bond, the context clearly shows the intention of the parties, a mere technical error in inserting the word "plaintiff" instead of "appellant" will not, of itself, invalidate such bond.

Appeal bond — sufficiency.

6. If the conditions of an appeal bond substantially cover the provisions of the statute, and secure to the respondent all that the law has designed for him, such bond is sufficient, although not in the exact words of the statute.

Opinion filed January 3, 1913.

Motion by appellant to advance the cause upon the calendar of this court.

Motion granted.

Statement by BRUCE, J. We have before us for consideration a motion to advance three cases upon the calendar of this court, all of which, though brought by separate plaintiffs, involve practically the same issues. The motion is made upon the somewhat novel, but at the same time reasonable, ground that the appellant (the defendant in the court below) is in danger of having his property sold under execution when, as a matter of fact, he is not only abundantly able to pay the judgment against him if affirmed by this court, but perfectly willing and able to give a cash or other bond to secure and indemnify the plaintiffs. These bonds he has, in fact, already given, for, though strictly speaking, and under the ruling of this court in a former motion (*Burger v. Sinclair*, post, 326, 140 N. W. 235), he has no legal right, under the statute and at this time, to give a supersedeas bond. but bonds for costs merely, he

has, either intentionally or unintentionally, in attempting to give such bonds for costs, given bonds which in terms secure the judgments also. Though such bonds cannot, under our former ruling, operate as supersedeas bonds, they nevertheless would, if accepted, fully indemnify the respondents against all loss, and fully secure their judgments.

The affidavits filed upon this and the former hearings show that defendant is abundantly responsible; that when the appeals were first taken he directed his attorney to have the judgment superseded, and until very recently supposed that this had been done; that his counsel, however, laboring, perhaps mistakenly, under the idea that a supersedeas bond was not necessary in law and under our statute, and certainly relying not only on the well-known solvency of the defendant, but that the plaintiffs and respondents were themselves solvent, and would probably not desire to subject themselves to the liability of three several suits in damages if they levied their executions, and the judgments were, after all, not affirmed, failed and refused to file such supersedeas bonds in the first instance and within the statutory time, and only awakened to the seriousness of his mistake when he not only discovered that the respondents were about to levy their executions, but that they had disposed of some of their property, so that, in case of a reversal of the judgments by this court on appeal, a collection on judgments for damages against them would be problematical. The purpose of asking that these causes be advanced is that they may be disposed of prior to the levy of the executions, and, if the said judgments are reversed, not only the levies averted, but the necessity also averted of bringing the subsequent actions for damages against the plaintiffs and respondents, which, as we said before, may be of no avail on account of the disposition of property by such plaintiffs.

Knauf & Knauf, for appellant.

Complaint must state facts to constitute cause of action. *James River Nat. Bank v. Purchase*, 9 N. D. 281, 83 N. W. 7.

The measure of recovery is the difference in the value of the land before and after the damage. *Cleveland School Dist. v. Great Northern R. Co.* 20 N. D. 124, 28 L.R.A.(N.S.) 757, 126 N. W. 995.

Proper foundation must be laid before opinion evidence as to value

can be received. *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359; 5 Enc. Ev. 615.

Knowledge must be shown as to prices at the place where buildings were destroyed. *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197; *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977; *Jones v. Mechanics' F. Ins. Co.* 36 N. J. L. 29, 13 Am. Rep. 405; *Guiterman v. Liverpool*, N. Y. & P. S. S. Co. 83 N. Y. 365.

Evidence as to value must relate to reasonable "market value." *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Blaen Avon Coal Co. v. McCullon*, 59 Md. 403, 43 Am. Rep. 560; *Gulf, C. & S. F. R. Co. v. Dunman*, — Tex. Civ. App. —, 31 S. W. 1070; *Aultman Co. v. Ferguson*, 8 S. D. 458, 66 N. W. 1081; *Watt v. Nevada C. R. Co.* 23 Nev. 154, 62 Am. St. Rep. 772, 44 Pac. 423, 46 Pac. 52, 726; *Frick v. United Firemen's Ins. Co.* 218 Pa. 409, 67 Atl. 743; *Johnson v. Northern P. R. Co.* 1 N. D. 354, 48 N. W. 227; *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1.

Carr & Kneeland and S. E. Ellsworth, for respondent.

Appeal or cost bonds must comply with the requirements of the statute governing appeal bonds. *Bergevin v. Wood*, 11 Cal. App. 643, 105 Pac. 935; *Stewart v. Lyness*, 22 N. D. 149, 132 N. W. 768; *Aldrich v. Public Opinion Pub. Co.* 27 S. D. 589, 132 N. W. 278; *Drinkwine v. Eau Claire*, 83 Wis. 428, 53 N. W. 673; *Bryson v. Lucas*, 85 N. C. 397; *Harshaw v. McDowell*, 89 N. C. 181; *Holcomb v. Teal*, 4 Or. 352; *Alberson v. Mahaffey*, 6 Or. 412; *State ex rel. Mahoney v. McKinmore*, 8 Or. 207; *Pencinse v. Burton*, 9 Or. 178; *McDonald v. Ellis*, 4 Ariz. 189, 36 Pac. 37; *McMillan v. Nye*, 90 N. C. 11; *Hemphill v. Blackwelder*, 90 N. C. 14; *Northern Counties Invest. Trust v. Hender*, 12 Wash. 559, 41 Pac. 913; *Turner v. Quinn*, 91 N. C. 92; *Bailey v. Rutjes*, 91 N. C. 420; *State v. Wagner*, 91 N. C. 521; *State ex rel. Rayssiguier v. Monroe*, 37 La. Ann. 113; *Thompson v. Thompson*, 24 Wis. 515.

BRUCE, J. (after stating the facts as above). We must remember that the real controversy in this case is not a controversy between the respective counsel, but between their clients, and that the province of this court is not to act as umpire in a fair fight between such counsel, but to see that justice is ultimately done to the litigating parties, and

that the administration of the law itself may be reasonable and without just subject for criticism. In the former motions (*Burger v. Sinclair*, post, 326, 140 N. W. 235) we held that, under the express wording of the statute, we had no jurisdiction or authority to allow the filing of a supersedeas bond, or the filing of a bond which would operate as a supersedeas in this court, and that the time for filing such bond in the district court had, under the statute, expired. We are here, however, asked merely to advance the particular cases on the calendar of this court, so that justice may be done, and unnecessary litigation and annoyance and humiliation obviated. We realize fully that the statute merely *requires us* to advance cases where some matter of public interest is involved, and that this matter is hardly a matter of *public* interest under the terms of the statute, though we believe that basic justice to the individual and a reasonable administration of the law is in one sense always a matter of public interest. We do not, however, believe that the statute which provides that matters of public interest shall be advanced prohibits us from advancing other causes when, in our reasonable discretion, it seems fitting that they should be advanced. In fact, we find no courts which have ever taken this position, but have rather taken the position that the control of their own calendars is within their discretion. This fact counsel for respondent, himself, seems to concede. An appeal to the courts is, at the most, a drastic measure. The levy and sale under any execution is, to say the least, humiliating. To insist upon such a levy and sale when, perhaps, the judgment under which the same is sought to be effected will ultimately be declared null and void, is certainly a matter which should be avoided if possible. Especially is this so where there is no doubt of the solvency of the defendant, and no doubt of his willingness and ability to pay any judgment that may be affirmed against him. To insist, indeed, that a defendant shall go through the idle, though humiliating, form of seeing his farm or other possessions, on which he may have labored for a lifetime, sold under the hammer of the sheriff, when the same may be absolutely unnecessary, and can be avoided by merely advancing a case upon the calendar, seems to be limiting judicial discretion altogether too much. This is especially true when there are three cases, all of which can be disposed of on the same argument, and the calendar cleared to that extent. No hardship is worked on the judgment creditors by

advancing the appeals for early argument,—only a short delay at most in collecting their judgments if the cases are so advanced, tried, and judgments affirmed. If reversed, no irreparable injury is done such as may result from a denial of this motion.

It may be said that the defendant may redeem from the executions. Even then he would be compelled to bring suit for the recovery of the money so paid, and not only might the question be raised that the payments were voluntary, but, according to some of the affidavits in this case, a collection of the judgments on such suits would be problematical. This court has, in the past, exercised its discretion in the control of its calendar. It has, for instance, in cases where counsel from certain towns or localities have had a number of causes upon the calendar, and by having a number of such argued at one time, the necessity of frequent journeys to the capital has been able to be avoided, allowed such causes to be argued out of their order. If this court can accommodate counsel, it certainly ought to be able to accommodate litigants themselves. Calendars and rules are made for litigants, and not litigants for calendars and rules. When a permissible exercise of discretion will result in administering justice, while a denial of its exercise will work injustice, we should resolve the question in favor of a just result, rather than stand on ceremony concerning the formal method used in reaching the desired end.

It is argued that the defendant in this case could go into a court of equity and enjoin the levy of the executions. Whether this could be done or not, we do not say, but even if it could be done, it would necessitate three other lawsuits, and, perhaps, three other appeals, the expense and delay of all of which can be obviated by the simple expedient of advancing the causes upon the calendar.

It is also contended that the appeals have all been dismissed “by operation of the mandate of this court made on a former motion to dismiss” (*Burger v. Sinclair*, post, 326, 140 N. W. 235), to the effect that “respondent’s motion to dismiss said appeal is denied on condition, however, that appellants, within twenty days from the date of this order, file with the clerk of the supreme court an undertaking for costs in compliance with the statute, with sureties to be approved by the clerk of the district court, and that, unless such condition is

complied with in the time aforesaid, the appeal in said action shall be dismissed."

Plaintiff's and respondent's counsel insists that though cost bonds were filed, two of them were insufficient in form, and that they were not filed long enough prior to the expiration of the twenty days to allow an exception to and justification of the sureties. On account of these defects he alleges that the order has not been complied with, and the appeals have therefore been dismissed by operation of law. We do not think that there is any force in either of his contentions. There can be no doubt that, under the order of the court, he was entitled to insist upon a justification of the sureties. The order, however, did not provide that this opportunity for justification should have been afforded within the twenty days. All that the order provided was that the bonds should be *approved by the clerk of the district court within that time*, and this was done. Two of the bonds were defective in that, evidently through a mistake of the stenographer, the word "plaintiff" was used instead of "appellant," the bond reading, "Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against plaintiff on said appeal." Defendant was the appellant, and therefore the use of the word "plaintiff" was incorrect. This mistake by no means invalidated the bonds, as the intention of the parties was elsewhere in the instrument, and, by the instrument as a whole, made perfectly clear. *Schill v. Reisdorf*, 88 Ill. 411; *Hilbish v. Asada*, 19 N. D. 684, 125 N. W. 556. There was, also, in each of the bonds, an additional promise and obligation which was, in itself, abundantly sufficient, and operated as a bond. It was to the effect that the sureties did "also undertake in the sum of \$900 that if the said judgment so appealed from, or any part thereof, is affirmed, or said appeal is dismissed, the said *appellant* will pay the amount directed to be paid by the said judgment, or any part of such amount as to which said judgment shall be affirmed, if it is affirmed only in part, and all damages which shall be awarded against said appellant on said appeal not exceeding the aggregates of the amounts above mentioned." This latter undertaking was abundantly sufficient to secure to the respondents their costs, and even if we held that the erroneous use of the word "plaintiff" invalidated

the former part of the instrument, the instrument as a whole is by no means a nullity. The bond at any rate was a good and sufficient common-law obligation. *Riley v. Mitchell*, 38 Minn. 9; *Kasson v. Brocker*, 47 Wis. 79, 1 N. W. 418; *Anderson v. Meeker County*, 46 Minn. 237, 48 N. W. 1022; *Gein v. Little*, 43 Misc. 421, 89 N. Y. Supp. 488; *Johnson Bros. v. Glaspey & Rennie*, 16 N. D. 335, 113 N. W. 602; *King v. Branscheid*, 32 Wash. 634, 73 Pac. 668, Rev. Codes 1905, sec. 7223; *Smith v. Mumford*, 9 Cow. 26.

We are of the opinion that the causes should be advanced. It is so ordered.

SPALDING, Ch. J., dissenting. I cannot concur in a decision which seems to be supported by apologies rather than reasons. The right to appeal is purely statutory. The legislative assembly has prescribed the terms and conditions upon which an appeal may be taken. It has likewise provided the method whereby a judgment of the district court may be stayed on appeal. It is incumbent upon the appellant to substantially comply with the requirements imposed upon him by the legislature. The courts have not been empowered to prescribe these terms and conditions. They can only determine whether they have been complied with. The appellant in this case deliberately and intentionally appealed without making provision for the statutory stay bond. His attention was called to the fact that he had not done this, and he advised counsel for respondent that he did not intend to do so. Great delay was had in perfecting his appeal and in getting into this court. Judgment was entered in favor of plaintiff on the 29th day of June, 1911. Time was extended and execution stayed to enable defendant to settle a statement of the case, until December, 1911, and a motion for a new trial was denied on the 20th of February, 1912. The appeal was not taken until March 27th, 1912. An imperfect cost bond on appeal was filed, with no stay bond. The defendant rested in security by reason of the stay of execution and extension thereof which had been granted him until more than a year had elapsed from the entry of judgment, when, in July, 1912, and after the district court had lost jurisdiction, application was made to a member of this court that defendant be allowed to file a bond or undertaking upon appeal for the purpose of securing a stay of execution, and for the approval of a

bond then presented. The bond presented failed in material respects to comply with the requirements of the statute. This fact was inadvertently overlooked by the judge who approved it and granted the order. Subsequently, such order was revoked by this court and it was held in *Burger v. Sinclair*, post, 326, 140 N. W. 235, in an opinion recently filed, that the defendant was not entitled to an order from this court permitting him to file such bond. Thereafter application was made to this court to have this case advanced from near the foot of the calendar to the head thereof, so that argument might be had on the appeal before respondent could levy execution and make sale to satisfy his judgment.

If the matter was one for the exercise of the discretion of this court, the conclusion reached might be justified, but if not, I see no excuse for permitting this indirect method of evading and avoiding the terms and conditions of the statute, as construed in our decision denying appellant the relief asked on the former application to which I have referred. I see no reason why, by indirection, he should in effect be given the same relief there denied. A petition for rehearing on the decision referred to has been pending for some days, and by refusing to act therein until a decision of this case on the merits, as advanced on the calendar, the defendant is given a supersedeas to which he is not entitled under any consideration when the facts are considered. The presumptions are in favor of the correctness of the verdict and judgment in the district court. The effect of this decision is to resolve all presumptions in favor of the appellant, and to deny to respondent the advantage and the rights to which he is entitled under his judgment and the facts. Much is made, in the majority opinion, of the fact that respondent is probably insolvent, as there stated. I think the evidence before us comes very far from proving this fact. It is alleged that he has sold some property, but the sale of property does not necessarily change one's financial status; in fact it may facilitate the enforcement of a judgment on execution.

When respondent brought this action against appellant, he took the chances of being able to enforce any judgment he might obtain. When appellant took his appeal and refused to furnish a stay bond, he deliberately took his chances on being able to recover from respondent in case of a reversal. These things are all incidents, and necessary inci-

dents, of litigation, except in so far as parties may protect themselves in the manner prescribed by law.

Considerable stress seems to be laid by the majority upon the fact that a bond purporting to be a supersedeas bond is now offered by appellant. In view of our former decision declining to permit him to give such a bond, the present decision based upon his offering it seems an anomaly. Its value in case of affirmance would likewise be quite problematical, as it may well be doubted whether respondent could recover upon it for lack of consideration. A hardship may result from any decision rendered by this court, but why should the hardship be imposed upon the party in whose favor the presumptions are, rather than upon the one who, under the law, must carry the burden of the appeal? It is true that this court has at all times control of its calendar, but the order in which cases are placed upon such calendar is fixed by law, and the statute prescribes exceptions to the order in which cases shall be heard. The court has, in some instances, varied from that order on consent of parties, but I have never known it to do so over the objection of a party, except in the cases named in the statute. Except for appellant's long and unexplained delays, the case might long since have been finally determined. The fact is that counsel in many cases are relying upon the favor of this court to relieve them from their own negligence or carelessness, and sometimes from their own erroneous, but intentional, conduct. Courts, as well as counsel, should be governed by the statute enacted for their guidance. Parties to other pending appeals have just ground for complaint at the delay occasioned by giving precedence to an application showing no merit greater than can be shown by any party who declines to protect himself.

These views also apply to *Seckerson v. Sinclair*, post, 326, 140 N. W. 239, and *Hawkins v. Sinclair*, post, 325, 140 N. W. 246, in which *per curiam* opinions are filed herewith.

FISK, J. I concur in the views of the Chief Justice.

HAWKINS v. SINCLAIR.

(140 N. W. 239.)

Opinion filed January 3, 1913.

Motion by appellant to advance the cause upon the calendar of this court.

Motion granted.

Knauf & Knauf, for appellant.

Carr & Kneeland and *S. E. Ellsworth*, for respondent.

PER CURIAM. The motion in this case presenting the same questions that were just determined by us in the case of *Burger v. Sinclair*, ante, 315, 140 N. W. 231, the decision in that case controls this. The same order is accordingly ordered to be entered herein.

HAWKINS v. SINCLAIR.

(140 N. W. 239.)

Opinion filed November 20, 1912. Rehearing denied January 7, 1913.

Motion by respondent to dismiss the appeal and also to vacate an order made by a judge of this court permitting a supersedeas undertaking on appeal to be given.

The motion denied and second motion granted.

Carr & Kneeland and *S. E. Ellsworth*, for respondent.

Knauf & Knauf, for appellant.

PER CURIAM. The motions in the case at bar present the same questions that were just decided by us in the case of *Burger v. Sinclair*, post, 326, 140 N. W. 235, and the decision in that case controls this. The same order will accordingly be made herein with the exception that no costs are allowed.

Goss, J., being disqualified, did not participate.

SECKERSON v. SINCLAIR.

(140 N. W. 239.)

Opinion filed November 20, 1912. Rehearing denied January 7, 1913.

Motions by respondent to dismiss the appeal and also to vacate an order made by a judge of this court permitting a supersedeas undertaking on appeal to be given.

First motion denied and second motion granted.

Carr & Kneeland and *S. E. Ellsworth*, for respondent.

Knauf & Knauf, for appellant.

PER CURIAM. The motions in the case at bar present the same questions that were just decided by us in the case of *Burger v. Sinclair* [next case] 140 N. W. 235, and the decision in that case controls this. The same order will accordingly be made herein, with the exception that no costs are allowed.

Goss, J., being disqualified, did not participate.

BURGER v. SINCLAIR.

(140 N. W. 235.)

Appeal — undertaking for costs — dismissal.

1. An undertaking for the payment of costs on appeal to the supreme court which is not conditioned as prescribed by § 7208, Rev. Codes 1905, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, is defective, and unless such defect is cured the appeal will be dismissed.

Justification of sureties — appeal bond.

2. Such undertaking is also defective where the affidavit of justification of the sureties fails to state that such sureties are worth the sum stated therein, over and above their debts and liabilities, "in property within this state not by law exempt from execution," as prescribed in § 7221, Rev. Codes.

Notice of appeal — good faith — correcting bond.

3. Where it appears that notice of appeal was given in good faith, and that such defects in the undertaking on appeal were occasioned through mistake or accident, the appellant will be given leave to supply such defects pursuant to the provisions of § 7224, Rev. Codes, even though the time for appealing has expired.

Abstracts and briefs — failure to file timely — dismissal — motion.

4. A failure to file abstracts and briefs in this court at least twenty-five days prior to the next regular term thereof constitutes ground for dismissal of the appeal within the sound discretion of the court; but where it appears, as in the case at bar, that the appellant has proceeded in good faith, and with due diligence, and has shown facts excusing such default, a motion to dismiss will be denied.

Supreme court — power.

5. An appellant who intentionally omits to give an undertaking to stay proceedings during an appeal from a judgment for money only cannot be afforded relief under the provisions of § 7224, Rev. Codes; and an order made by a member of this court permitting the filing of an undertaking is held to have been improvidently made, and the respondent is entitled to have the same vacated.

Appeal — supersedeas.

6. In the light of the plain provisions of our appeal statute providing for and regulating the giving of undertakings to stay proceedings on appeal, *held* that this court does not possess any inherent power to grant a supersedeas under the facts disclosed in the case at bar.

Opinion filed November 20, 1912. Rehearing denied January 7, 1913.

Motions by respondent to dismiss the appeal and also to vacate an order made by a judge of this court permitting a supersedeas undertaking on appeal to be given.

The first motion is denied on condition, and the second motion is granted.

Carr & Kneeland and *S. E. Ellsworth*, of Jamestown, North Dakota, for respondent.

Knauf & Knauf, of Jamestown, North Dakota, for appellant.

FISK, J. Respondent moves to dismiss the appeal herein upon the grounds:

1st. That the undertaking for costs which was served and filed with

the notice of appeal on March 27th last is not conditioned, as provided by statute, for the payment by appellant of all costs and damages which may be awarded against him on the appeal, not exceeding \$250.

2d. That such alleged undertaking does not contain a justification of the sureties to the effect that they were worth the certain sum mentioned in their affidavit of justification over and above their debts and liabilities "in property within this state not by law exempt from execution;" and

3d. That appellant has failed to file abstracts and briefs on such appeal at least twenty-five days prior to the October term of this court pursuant to statute and rule xxii. of this court.

Notice of such motion was not served on appellant's counsel until September 23d, and the motion was noticed for the first day of the present October term.

The undertaking is concededly defective as to the justification of the sureties, and we think is also defective in the particular pointed out in the first ground of respondent's motion. Appellant, however, makes a counter motion for leave to amend or supply a new undertaking. This is resisted by respondent, his contention, in brief, being that such undertaking was and is ineffectual to confer any jurisdiction on this court over such appeal; and that the time for appeal having expired, this court is powerless to grant appellant any relief under § 7224, Rev. Codes. Respondent relies upon the cases of *Aldrich v. Public Opinion Pub. Co.* 27 S. D. 589, 132 N. W. 278; *Drinkwine v. Eau Claire*, 83 Wis. 428, 53 N. W. 673; *State ex rel. Rayssiguier v. Monroe*, 37 La. Ann. 113; and *Thompson v. Thompson*, 24 Wis. 515.

To the extent that the South Dakota court in the *Aldrich Case* holds that no jurisdiction is conferred by the attempted appeal, sufficient to enable the supreme court to permit an amendment of, or the giving of a new undertaking in lieu of the defective one, we think the decision is both unsound and contrary to the great weight of authority under statutes substantially like that in South Dakota. It is held in effect by the majority opinion that the jurisdiction to permit such amendments or the giving of new bonds is derived from the statute conferring the power of amendments, and not from the attempted appeal; the line of reasoning being that because § 445 of the South Dakota Code

provides that "to render an appeal effectual for any purpose an undertaking must be executed on the part of the appellant," etc., a failure to comply therewith confers no jurisdiction, even for the purpose of permitting an amendment under § 461 of their Code. Among other things, it is there said: "If it [the legislature] had assumed that jurisdiction was acquired by the giving of notice of appeal, it would follow as a necessary consequence that, after the giving of such notice, the circuit court would cease to have jurisdiction of the case, and it is inconceivable to suppose that the legislature would confer upon the circuit court or judge power to relieve parties from default in cases over which they had lost jurisdiction and jurisdiction had vested in the appellate court, and by the same section, confer the same power upon the supreme court by virtue of its jurisdiction of the cause upon appeal." The fallacy of such reasoning is apparent, for it is elementary that after an appeal is taken and perfected the lower court retains jurisdiction to take any step necessary in furtherance of the appeal; and were this not so, it is perfectly clear that the legislature would have the power, by express statute, to confer such jurisdiction. Jurisdiction to hear and determine the cause by the appellate court is one thing, while jurisdiction sufficient to enable the appellate court to permit amendments or the necessary acts to be done in order to complete its jurisdiction over the cause on appeal, is quite another thing, and such distinction is clearly made by the supreme court of Wisconsin in construing the statute from which both the statutes of South and North Dakota were borrowed. In *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909, it was said on page 212 of the opinion:

"Next it is contended on the part of respondents' counsel that, though the notice of appeal was served as required by § 3049, and the record transmitted to this court, no jurisdiction was obtained here for any purpose whatever; and that the defect is not remediable. On the other hand, appellants' counsel just as confidently contend that the failure to execute the bonds required, or to serve the same as the statute provides, does not militate against jurisdiction having been conferred here for some purposes, citing in support of that, *Helden v. Helden*, 9 Wis. 557; *Russel v. Bartlett*, 9 Wis. 556; *Smith v. Chicago & N. W. R. Co.* 19 Wis. 89; *White v. Polleys*, 20 Wis. 503, 91 Am. Dec. 432; *Grant v. Connecticut Mut. L. Ins. Co.* 28 Wis. 387; *Branger v. Butt-*

rick, 30 Wis. 153; Ulrich v. Farrington Mfg. Co. 69 Wis. 213, 34 N. W. 89. The effect of those cases is that the mere taking of an appeal by the service of a proper notice and sending the record here does not give the court such jurisdiction as to enable it to hear the cause, but does give it the necessary jurisdiction to enable it to permit the appeal to be perfected by the service of a proper bond, or cure any other defect in the proceedings within the period limited by statute for appealing; and that, if the proper undertaking is executed and filed, but not properly served, the court acquires such jurisdiction as to enable it to hear and decide the cause, the adverse party not seasonably objecting, failure in that regard being deemed a waiver of such service or an estoppel as regards suggesting such failure with effect. In that the court, as will be seen, gave force to the statute in all substantial essentials. Section 3052 says that, 'to render an appeal effectual for any purpose, an undertaking must be executed,' etc. That suggests at once that an appeal may have an existence before the execution of the undertaking, though not for all purposes. The term 'any purpose' clearly includes the duty of the clerk below to certify up the record and proceedings here as regards a hearing of the cause. The clerk has no right to act in the matter till he can accompany the papers with some semblance, at least, of a proper undertaking under § 3052. That is the effect of § 3050. That the former section means as indicated must be the case to render it harmonious with § 3049, to the effect that any appeal will be deemed 'taken by the service of the notice of appeal and perfected on the service of the undertaking for costs, or the deposit of money instead, or the waiver thereof as hereinafter prescribed.' The waiver mentioned is required to be in writing. § 3051. Consistent with the meaning we attribute to §§ 3049, 3050, and 3052, we have § 3068, providing that: 'When a party shall, in good faith, give notice of appeal, and shall omit, through mistake or accident, to do any other act necessary to perfect the appeal, or make it effectual, or to stay proceedings, the court from which the appeal is taken, or the presiding judge thereof, or the supreme court, or one of the justices thereof, may permit an amendment or the proper act to be done, on such terms as may be just.' So, as said in Grant v. Connecticut Mut. L. Ins. Co. 28 Wis. 387, when a notice of appeal is duly served in good faith, jurisdiction is at once conferred upon this court as well as the trial court for some purpose,

i. e., that of permitting the appeal to be perfected so that it can be heard."

Again, in *Oconto Land Co. v. Mosling*, 122 Wis. 440, 100 N. W. 824, it was said: "It is conceded, as the fact is, that the notice of appeal was properly served pursuant to § 3049, Stat. 1898; that, by the express words of such section, constituted the taking of an appeal, and conferred jurisdiction here, sufficient to enable this court to permit such mistakes to be corrected as may be necessary to put it in that full possession of the cause requisite to a hearing and determination thereof, though § 3052 provides that, to render an appeal 'effective for any purpose' an undertaking must be executed as therein required. This subject was so recently discussed, all previous adjudications being referred to, in *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909, that it seems we ought not now to do more than to refer thereto in deciding the matter. As therein indicated, the power of the court is ample, and has often been exercised, to allow an appeal to be perfected in circumstances the same or similar to those characterizing this one."

The Oregon court, under a very similar appeal statute, also held in the case of *Dowell v. Bolt*, 45 Or. 89, 75 Pac. 714, as follows: "It is . . . the serving and filing of a notice of appeal within the time and according to the manner prescribed, that confers jurisdiction on the appellate court, and constitutes the taking of an appeal, the strict performance of which cannot be waived by the parties nor excused by the court. The giving of an undertaking, however, is one of the steps required to perfect an appeal; and, under the liberal provisions of the statute quoted, the appellate court may permit the performance of such act when it appears that the notice of appeal has been given in good faith, and that the failure to comply with the requirements of the statute is occasioned by mistake." See also *Nottingham v. McKendrick*, 38 Or. 495, 57 Pac. 195.

The cases of *Drinkwine v. Eau Claire*, 83 Wis. 428, 53 N. W. 673, and *Thompson v. Thompson*, 24 Wis. 515, also cited and relied on by respondent's counsel, are not in point. The first one involved an appeal from the action of the city council to the superior court; and the latter involved an appeal from the county court to the superior court; and the statute of Wisconsin, similar to § 7224 of our Code permitting amendments of appeals to the supreme court, had no application, nor

does the case of *State ex rel. Rayssiguier v. Monroe*, 37 La. Ann. 113, appear to have been based upon an appeal statute similar to that in this state.

We are clearly of the opinion that where the appellant has, in good faith, served notice of appeal within the time and in the manner provided by the Code, and has, through mistake or accident, omitted to do any other act necessary to perfect the appeal or to stay proceedings, this court or any one of the justices thereof is given jurisdiction by virtue of such appeal to permit an amendment of the property act to be done on such terms as may be just.

Are we restricted in granting such relief to a period prior to the expiration of the time given in which appellant might appeal? Section 7224 is very broad in its language, and does not in any manner thus restrict the courts; but the Wisconsin court in several cases has held that where no cost bond is given within the time, the appeal must be dismissed. We will briefly review some of such cases.

In *Ady v. Barnett*, 142 Wis. 18, 124 N. W. 1061, the undertaking was defective for failure of the surety to justify as the statute requires, and the court held it proper to allow appellant to remedy such defect, even after the time had expired within which to take the appeal. The Wisconsin statute (§ 3052, Stat. 1898) is the same as § 7208, Rev. Codes of North Dakota, and provides: "To render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding \$250," and § 3065 of the Wisconsin statute is the same as § 7221, Rev. Codes of North Dakota, providing that such undertaking shall be of no effect unless the sureties justify in a manner provided therein.

The above decision was followed in the recent case of *Kuehn v. Nero*, 145 Wis. 256, 130 N. W. 56.

In *Munk v. Anderson*, 94 Wis. 27, 68 N. W. 407, the appeal was dismissed because the undertaking for costs was not served within the two years allowed for appeal. It does not appear that such failure to serve it in time was due to mistake or accident, nor was there any application made for relief under the section authorizing amendments.

In *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015, no undertaking

for costs necessary to perfect the appeal was given, and a motion was made to dismiss the appeal. The appellant sought relief under the section permitting amendments, but such relief was denied solely on the ground that the omission to serve the undertaking was not through mistake or accident. Hence relief under such statute could not be granted.

Haessly v. Secor, 135 Wis. 548, 116 N. W. 175, is similar to *Munk v. Anderson*, *supra*, no undertaking having been given within the thirty days' time allowed for appealing. No showing of mistake or accident was made, but appellant's contention was that, having served the notice of appeal within the time prescribed by statute, the appeal was taken, and that he had a right to give the undertaking after such time had expired, basing his contention on the case of *Oconto Land Co. v. Mosling*, 122 Wis. 440, 100 N. W. 824; but such case was distinguished, appellant's contention overruled, and the appeal dismissed. It seems, therefore, to be the settled rule in Wisconsin that an undertaking for costs which is defective because of no justification of the sureties may be remedied after the time for appeal has expired. Under such rule, the soundness of which is, we think, beyond doubt, appellant, in the case at bar, should be given permission to supply the defect in the justification of the sureties. We think, also, that the other defect is not so serious as to bring it without such rule. The condition of the undertaking, instead of complying strictly with the statute (§ 7208), is "that the appellant will pay all costs and damages herein, and hereby if the judgment and order denying the motion for a new trial be affirmed herein, and any and all costs and damages, if any there be, awarded the plaintiff . . . in case the order . . . and the judgment herein entered shall be affirmed . . ." Such instrument cannot be treated as a nullity or as if no undertaking had been given. While it does not provide by its terms for the payment of all costs and damages which may be awarded on the appeal, and consequently, as argued by respondent, it does not cover a contingency which might happen by a dismissal of the appeal as distinguished from an affirmation of the judgment and order appealed from, we hold that such defect may be supplied by the filing of a new undertaking under the provisions of § 7224.

Under the facts before us there can be no question as to appellant's good faith in giving notice of the appeal.

This conclusion renders it unnecessary to construe § 7224 further than as above construed, and we shall not do so, although the writer of this opinion, speaking for himself alone, is inclined to the belief that said statute, being remedial in its nature, should receive a very liberal construction; it being the evident aim and purpose of the legislature by its enactment to confer upon the courts the power to permit appellants who have, in good faith, given notice of appeal, but through mistake or accident have omitted to do, in the language of the statute, any other act necessary to perfect the appeal, to make it effectual or to stay proceedings, to supply such defects at any time, even though the time for appealing has expired. That the legislature had the power to authorize such amendments cannot be doubted. The statute does not restrict the allowance of such amendments to a time prior to the expiration of the time given for appeal, and for the courts to thus restrict its language is a thwarting of the legislative will. I see no good reason why omissions caused through mistake or accident should not be supplied after, as well as before the time for appeal has expired. Nor do I see any good reason why such relief should be restricted to cases where a slight omission has occurred, and not extended to all omissions as the statute reads. Such a narrow construction operates in effect to aid those who really need no aid, for if the time for appeal has not expired the appellant may always proceed over again by the service of a new notice and undertaking on appeal, and this, whether in the first instance he acted in good faith in giving notice of appeal, or not.

The third ground of appellant's motion requires but brief notice. Respondent's counsel do not lay much stress upon this feature of the motion, but concede that the dismissal on such ground rests within the sound discretion of the court. We are convinced of the utmost good faith of appellant in taking the appeal, and we think the slight delay is fully excused. It follows that respondent's motion to dismiss the appeal should be denied, on condition, however, that appellant, within twenty days, file with the clerk of this court an undertaking for costs in compliance with the statute, with sureties to be approved by the clerk of the district court, and upon the further condition that appellant pay to the respondent's counsel within such time the sum of \$25, costs of

the motion. Unless these conditions are complied with within the time aforesaid, the appeal will be dismissed.

This brings us to the consideration of another motion made by respondent's counsel, and argued and submitted with their prior motion. It is in the form of an order requiring appellant to show cause why a certain order made by one of the members of this court on July 19, 1912, permitting a supersedeas undertaking to be served and filed, should not be vacated and the application of appellant for a supersedeas be denied. We think respondent's motion should prevail. The record discloses that the judgment appealed from is for money only, and it was entered on June 29, 1911. Notice of appeal and the undertaking for costs involved in the first motion were served on March 27, 1912, but no undertaking for stay of execution was served or filed, nor was any attempt made to serve or file such an undertaking, it affirmatively appearing that there was no intention on appellant's part so to do. Hence, it cannot be said that the failure to serve and file the same was caused either by mistake or accident. It follows that relief under § 7224, Rev. Codes, cannot be granted, as the case does not come within the provisions of such section. *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015. The order made on July 19th, and which we are now asked to vacate, was therefore improvidently issued, and the same must be vacated as prayed for by respondent. In the light of the plain provisions of our appeal statute providing for and regulating the giving of undertakings to stay proceedings during an appeal, appellant's contention that this court is clothed with inherent power to grant such stay of proceedings under the facts here presented is, we think, untenable.

The order aforesaid is vacated, with \$25 costs of motion allowed to respondent.

Goss, J., not participating.

SPALDING, Ch. J. (concurring specially). While it is not perfectly clear to me that the first part of this decision does not come dangerously near being judicial legislation, and while I concur therein with great reluctance for that reason, yet I do concur, because by doing so the ends of justice will be more nearly subserved, and the legislative assembly can readily apply the remedy should it feel that the court has, by construction, extended the period allowed by statute for taking and

perfecting appeals to this court. I can readily see how § 7224, Rev. Codes 1905, to which reference is made, may admit of an appeal being perfected by the substitution or amendment of an undertaking, if applied for within the period allowed for appeal. This is the holding of the supreme court of South Dakota in *Aldrich v. Public Opinion* Pub. Co. 27 S. D. 589, 132 N. W. 278; and if my judgment was infallible, and stood alone, I should say that this court would be justified in following that decision. I, however, yield to the combined opinion of my associates, for the reasons stated, and concur therewith.

On the second motion I also concur.

**MURPHY v. CASSELMAN and the United States Fidelity & Deposit
Company of Baltimore, Maryland.**

(139 N. W. 802.)

**Redemption — purchaser — execution — voluntary payment — appeal —
dismissal.**

The redemption from the purchaser of property sold under an execution is not a voluntary payment of the debt for the cancelation and payment of which the said execution was levied and said property sold. Where, therefore, an appeal has been taken to the supreme court from the judgment on which said execution was levied, the redemption of the property from the purchaser, even though such purchaser is the plaintiff in the original suit, will not be considered to be a voluntary payment of the debt, and to be a ground for a dismissal of the appeal taken.

Opinion filed January 11, 1913,

Appeal from the District Court for Grand Forks County, *Templeton, J.*

Motion to dismiss appeal on the ground of voluntary payment of the judgment.

Denied.

Statement by BRUCE, J. This is a motion to dismiss an appeal on the ground that the matters in controversy have been disposed of by a voluntary payment, and that the appeal would now merely raise a moot question. On the 17th day of June, 1902, a judgment was rendered in favor of one Frank B. Lown, trustee, and against one Judson P. Casselman, in the district court of Grand Forks county, for the sum of \$985.09. On the 18th day of June, 1902, C. J. Murphy, attorney for said Frank B. Lown, filed an attorney's lien against this judgment. On the 1st day of August, 1903, Casselman was declared to be a bankrupt in the United States district court for the district of Minnesota, and discharged of all debts and claims which existed on and prior to the 18th day of May, 1903. On the 1st day of April, 1911, a petition was filed in the district court of Grand Forks county to have the said judgment of Frank B. Lown, trustee, against said Casselman, discharged of record under the provisions of § 3898 of the Revised Codes of North Dakota. This petition was denied in part by order of the district court dated June 8, 1911, the order preserving the judgment to the extent of the claim of C. J. Murphy, the respondent in the action now before the court, to an attorney's lien upon the same. On the 19th day of August, 1911, the said Murphy issued an execution on the judgment. On the 16th day of September, 1911, the said Casselman, as principal, and the United States Fidelity & Deposit Company of Baltimore, as surety, executed a bond to C. J. Murphy in the sum of \$600, "that if C. J. Murphy fails to maintain an action to recover said claim of lien, this obligation shall be void." Prior to the 30th day of September, 1911, C. J. Murphy started an action against J. P. Casselman and the United States Fidelity & Deposit Company on the bond. In this action, and on January 15, 1912, a judgment was rendered in favor of the plaintiff and respondent herein, C. J. Murphy, and against both the said Casselman and the said United States Fidelity & Deposit Company, for the sum of \$500.37 and \$37.65 costs. On September 30, 1911, and after the commencement of the last-mentioned action, the said C. J. Murphy caused property belonging to Judson P. Casselman, which the said Casselman claims in his affidavits to exceed in value the sum of \$10,000, to be sold under the execution theretofore issued on the said Frank B. Lown judgment. At said sale the said Murphy became the purchaser, and certificate of execution sale was

thereupon issued to him. Said Murphy paid no money on said sale, but the purchase was made upon the assumption that the said Murphy was owner of that part of the judgment that had been preserved by the court's order as hereinbefore stated, for the protection of his said lien. Appeals were perfected by the defendants, the United States Fidelity & Deposit Company and Judson P. Casselman, in both the suit by C. J. Murphy on the bond hereinbefore referred to, and by Judson P. Casselman in the original suit of Frank B. Lown against Judson P. Casselman. Both appeals were taken in time to have the causes placed on the April, 1912, calendar of this court. These appeals are, however, still upon the calendar, and have not yet been reached for argument.

On the 28th day of September, 1912, and just before the time for redemption expired, Judson P. Casselman tendered the sheriff of Grand Forks county the amount necessary to redeem from the sale under the Lown judgment, and a certificate of redemption was issued to him by the sheriff. C. J. Murphy, the purchaser at said sheriff's sale and the owner of the lien aforesaid, and the plaintiff and respondent in the suit by C. J. Murphy on the bond hereinbefore referred to, and against Judson P. Casselman and the said United States Fidelity & Deposit Company, now moves this court to have the appeals in both cases dismissed on the ground that said judgments are, according to affiant's opinion and belief, by operation of law satisfied and discharged by the payment made by said Judson P. Casselman in tendering the redemption from the execution sale in the case of Lown v. Casselman, and that therefore the merits of the controversy involved in the appeals in these cases have been disposed of.

Murphy & Duggan, for respondent.

W. J. Mayer, for appellants.

BRUCE, J. (after stating the facts as above). The only question to be decided on this motion is whether the payment by the defendant Judson P. Casselman, in order to redeem the property sold under the judgment rendered in the case of Lown v. Casselman, and for the satisfaction of the attorney's lien of the plaintiff Murphy, which the district court had ordered preserved, was so far a

voluntary payment of the lien and the debt that, if the judgment in said cause were set aside by this court on the appeal now pending, no recovery could be had by the said Casselman for damages accruing from the levy of the execution in said cause. We think that there is only one answer to this question, and that there was no such voluntary payment. A distinction must be made between the payment of a debt, and the redemption of property which has been sold in order that that debt may be extinguished. When the defendant Casselman redeemed the property, he did not pay any debt. The debt had already been paid and extinguished by the sale of the property under the execution. If the property had been sold at the execution sale to a third party, and not to the plaintiff Murphy, there would have been no necessity for any communication either between the purchaser and the said Murphy, or between the defendant and said Murphy. The debt to Murphy was paid. It was paid by the sale of Casselman's property on execution. This payment was involuntary, and not voluntary. When Casselman redeemed he was a purchaser of the property, and nothing more. The fact that Murphy was himself the purchaser at the sheriff's sale does not change the real position of the parties. When he bid in the property he bid it in as a purchaser, and not as a creditor. This is made clear by § 7140 of our statute which relates to redemptions, and which provides that he who seeks to redeem shall pay to the purchaser, not the amount of the judgment debt, but merely the amount of *his* purchase. The origin of the word *redemption* is to be found in the Latin words *re* and *emere*. Its principal definition as given by Mr. Webster is *to purchase back: to regain possession by payment of a stipulated price: repurchase*. Under the old Israelitish Law, a man who sold a dwelling house in a walled city might *redeem* it within a whole year after it was sold. Lev. 25, 29. In this case there was no assumption of a debt to the vendee, but a mere right to repurchase in the vendor, and, though the word *redeem* has often been used in other senses, this is the general and primary use of the word. In speaking of the subject, the supreme court of Wisconsin, in *Lindsay v. Fay*, 28 Wis. 181, has said: "Was such redemption an actual payment of the tax? It was said by the chief justice in *Woodbury v. Shackelford*, 19 Wis. 55, that 'it is a settled principle in the construction of statutes of limitation that general words are to have a general operation, and

unless there can be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment. No exceptions can be claimed by or in favor of particular persons or cases, unless they are expressly mentioned.' . . . Applying these rules to this case, the conclusion seems inevitable that a redemption of the land is not a payment of the tax. To hold otherwise would be to restrain the operation of the statute 'by arbitrary addition,' which the rule of law forbids. There seems to be a wide difference between the payment of the tax by the owner of the land, and the redemption of the land by him after it has been sold for nonpayment of the taxes assessed upon it. *There is really no tax to be paid when land is thus redeemed.* That has been cancelled by the sale. The redemption is the payment to the holder of the certificate of an encumbrance which he thereby has upon the land, and does not seem to be the payment of a tax in any correct sense of that term." The logic of this case seems to us to be irresistible, and the wisdom and the justice of the rule seem to be equally clear. The rule of voluntary payments is, at the best, a harsh rule, and has been harshly applied, and we do not feel that it should be twisted and distorted so as to apply to a case such as that before us.

We are not unmindful of the cases of *Shane v. St. Paul*, 26 Minn. 543, 6 N. W. 349, and *Wessel v. D. S. B. Johnston Land & Mortg. Co.* 3 N. D. 163, 44 Am. St. Rep. 529, 54 N. W. 922, cited by counsel for respondent. It is to be remembered, however, that the former case was one in which an attempt was made to recover from the city of St. Paul taxes which had been voluntarily paid to it, or, rather, to redeem from said city land which had been sold upon a void tax judgment; while the latter was one in which a recovery was sought of money paid to redeem real estate from a foreclosure sale in a case, in which the plaintiff was and always had been in possession, and where the foreclosure proceedings were totally void. The only reason why the North Dakota court held the payment in the latter case to be voluntary was because of this possession and right of possession, and that there was no attempt or danger of an eviction of the plaintiff, nor real duress either of himself or of his goods. So, too, in this case there had been no adjudication of the rights of the parties. There had merely been an invalid foreclosure by advertisement, prior to which the lien of the mortgage

had been extinguished by a tender of payment. Both parties knew this. The foreclosure and sale were of no effect for this reason. There was no foreclosure or sale, and hence, strictly speaking, there could be no redemption. Both parties knew these facts; hence, any payment for any purpose, not being a redemption, must have been a payment of the debt.

In considering the Minnesota case, we must also remember that a much greater strictness has been noticed in the courts in cases involving suits for the recovery of taxes illegally paid, than in other instances. See notes in 94 Am. St. Rep. 425. The general rule certainly is that expressed by the supreme court of South Dakota in the case of Whittaker v. Deadwood, 12 S. D. 608, 82 N. W. 202. This was an action to have declared illegal and void certain special assessments for street improvements, and to cancel certain tax certificates. Pending the appeal from an adverse decision in the lower court, plaintiff redeemed his property from the tax sale, and a motion to dismiss was made in the supreme court. The court refused to entertain the motion. In doing so it was certainly acting in accordance with the growing weight of authority, which seems to be to the effect that where there is a real attempt to interfere with the enjoyment of property rights, coupled with a present ability on the part of the wrongdoer to so interfere, a payment made in protection of such rights will not be considered voluntary. See notes to *New Orleans & N. E. R. Co. v. Louisiana Constr. & Improv. Co.* 94 Am. St. Rep. 409, et seq. In the North Dakota case of *Wessel v. D. S. B. Johnston Land & Mortg. Co.*, there was no attempt to deprive the plaintiff of the possession of property, nor any power to deprive him of such. The plaintiff was in possession, and his only purpose in paying the claim was to remove a cloud upon his title. In the case at bar the facts seem to be very different. *Peyser v. New York*, 70 N. Y. 497, 26 Am. Rep. 624.

There is also another and more controlling reason for holding that the Wessel Case does not control here, and on which to distinguish cases cited and relied upon by counsel for respondent. An examination of the Wessel Case and the case of *Shane v. St. Paul*, and nearly all of the cases cited and relied upon in these decisions, will show that they were cases in which an attempt was made to recover from the payee the money paid, and not cases where an action for damages was brought

against the plaintiff in the suit in which the execution was issued, or against the mortgagee in foreclosure proceedings for a wrongful seizure and sale of property. In the latter case the amount paid in order to redeem might be evidence of the damage sustained, but it is not the gist or subject of the action. It might very well be that one could not recover from the purchaser of the sheriff's certificate at a mortgage sale the amount paid to him to redeem from such certificate, but might, nevertheless, sue the mortgagee for unlawfully selling the property in the first instance. In other words, we believe that the distinction made in the first part of this opinion is controlling, and that there is a wide distinction between a redemption and a payment.

The motion is denied.

LOWN, Trustee, v. CASSELMAN.

(139 N. W. 804.)

Opinion filed January 11, 1913.

Appeal from the District Court for Grand Forks County, *Templeton*, J.

Motion to dismiss the appeal on the ground of a voluntary payment of the judgment.

Motion denied.

Murphy & Duggan, for respondent.

W. J. Mayer, for appellant.

PER CURIAM. The questions involved upon the determination of this motion having been decided in the case of *Murphy v. Casselman*, ante, 336, 139 N. W. 802, decided at this term of court, that decision controls in this case, and the motion to dismiss the appeal is denied.

COSGRAVE v. McAVAY.

(139 N. W. 693.)

Plaintiff seeks to foreclose a recorded real estate mortgage upon lands in Kidder county, this state, securing a negotiable principal note of \$1,000, and interest coupons, due at the office of the mortgagee in Minneapolis. The mortgagee sold the notes before maturity and assigned of record the mortgage to plaintiff. Defendant, mortgagor, had no knowledge or notice of such assignment, and supposing the mortgagee still owned the notes and mortgage, paid him in full therefor before maturity of the principal note and three of the unpaid interest coupon notes. The mortgagee, upon such payment, did not produce or surrender to the mortgagor the notes or mortgage, or inform the mortgagor of their transfer, and died without paying plaintiff, holder, any part of the principal note so paid the mortgagee in full by the mortgagor. Upon a subsequent instalment of interest coming due and being unpaid, plaintiff, pursuant to authority contained in the mortgage, declared the principal debt immediately due and payable, and brought this action to foreclose the mortgage to recover the mortgage debt. Defendant pleads that, under § 4183, of the Statutes of Minnesota, the mortgage debt was satisfied by the payment to the mortgagee. That statute reads: "The record of an assignment of mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee." Under our statute, § 6167, Rev. Codes 1905, to discharge the debt, the payment must be made "to the person holding such note, bond, or other instrument." By the Minnesota statute, notwithstanding a mortgage may so provide, the due date of the principal note cannot be advanced on a default in payment of interest. Defendant contends that the notes and mortgage are Minnesota contracts, there performable, and are governed by the laws of that state claimed to discharge the debt and mortgage, and prevent a foreclosure for the principal debt not due, if the principal debt be held to be not satisfied. *Held:*

Contract — mortgage — sister state — construction.

(1) Though the contract is one between Minnesota parties, and governed by the Minnesota law, the Minnesota recording statute does not discharge the mortgage debt, and cannot affect the mortgage as a contract for security upon lands in this state.

Foreclosure — law of forum — procedure.

(2) The courts will administer the law of the forum governing procedure in foreclosure.

Debt secured — default — interest.

(3) Though the principal debt may not have been due upon mortgagor's default in payment of interest, foreclosure could be had for the full amount, less rebated interest.

Opinion filed January 11, 1913.

Appeal from the District Court of Kidder County, *Winchester, J.*
Affirmed on rehearing had.

James A. Murphy, R. G. McFarland, and Samuel Whaley, for appellant.

Rights of parties to this action are to be determined by laws of Minnesota, because parties resided there at time notes, mortgage, and assignment were made, and note payable in Minnesota. 7 Cyc. 639, 640, note 55; 1 Dan. Neg. Inst. p. 658, et seq.; *Central Trust Co. v. Burton*, 74 Wis. 333, 43 N. W. 141; *Newman v. Kershaw*, 10 Wis. 333.

Recording of assignment of mortgage not notice to defendant of transfer of papers and title. Minn. Gen. Stat. 1894, § 4183; N. D. Rev. Codes, 1905, § 6167.

Notes secured by mortgage upon land in another state do not change rule. *Central Trust Co. v. Burton*, 74 Wis. 333, 43 N. W. 141; *Cubbedge v. Napier*, 62 Ala. 518; *Caldwell v. Edwards*, 5 Stew. & P. (Ala.) 312; *Talbot v. Chester*, 2 Chester Co. Rep. 57.

The law of place of performance prevails. 22 Enc. Law, 2d ed. 1325; *Newman v. Kershaw*, 10 Wis. 333.

Note and mortgage are separate contracts. *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867.

Assignment of mortgage does not involve question of title and is governed by place where made. *Jones, Mortg.* 473, 474, 961, 27 Cyc. 1282; Minn. Gen. Stat. 1894, sec. 4183. *Olson v. Northwestern Guaranty Loan Co.* 65 Minn. 475, 68 N. W. 100.

Payments made to original mortgage in ignorance of assignment of mortgage are valid, and extinguish mortgage. *Pickford v. Peebles*, 7 S. D. 166, 63 N. W. 779; *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687; *McVay v. Tousley*, 20 S. D. 258, 129 Am. St. Rep. 927, 105 N. W. 932; *Barry v. Stover*, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672.

This rule is the general rule. 27 Cyc. 1316. (Minn.) *Citizens'*

State Bank v. Julian, 153 Ind. 655, 54 N. E. 390, 55 N. E. 1007; *Olson v. Northwestern Guaranty Loan Co.* 65 Minn. 475, 68 N. W. 100; *Hostetter v. Alexander*, 22 Minn. 559; *Johnson v. Carpenter*, 7 Minn. 176, Gil. 120.

(N. Y.) *Barnes v. Long Island Real Estate Exch. & Invest. Co.* 88 App. Div. 83, 84 N. Y. Supp. 951; *Pettus v. McGowan*, 37 Hun, 409; *New York L. Ins. & T. Co. v. Smith*, 2 Barb. Ch. 82; *Reed v. Marble*, 10 Paige, 409; *Wolcott v. Sullivan*, 1 Edw. Ch. 399; *Ely v. Scofield*, 35 Barb. 330.

(Pa.) *Foster v. Carson*, 147 Pa. 157, 23 Atl. 342, 159 Pa. 477, 39 Am. St. Rep. 696, 28 Atl. 356.

Van Keuren v. Corkins, 66 N. Y. 77; *Foster v. Beals*, 21 N. Y. 247; *Armstrong v. Combs*, 15 App. Div. 246, 44 N. Y. Supp. 171; *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87; 52 Mich. 525, 18 N. W. 248; *White v. Miller*, 52 Minn. 367, 19 L.R.A. 673, 54 N. W. 736.

Entry of personal judgment for money, upon a decree for sale, a nullity. *Thompson v. Dale*, 58 Minn. 365, 59 N. W. 1086.

S. E. Ellsworth, Stanley & Phelps and *Jesse Van Valkenburg*, for respondent.

Parties making and taking mortgage upon land in another state are presumed to contract with reference to the laws of the state where the land lies. *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37.

Bona fide holders of negotiable note and mortgage, for value, and in due course, is protected as against payment made to original payee. *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274.

Ordinary precaution requires the production of the notes, when payment is sought to be made. *Klindt v. Higgins*, 95 Iowa, 529, 64 N. W. 414.

The law of the place where the land lies governs as to title and the enforcement of the lien. 1 *Jones*, Mortg. 5th ed. p. 593; 22 *Enc. Law*, 2d ed. p. 1337; *Bronson v. St. Croix Lumber Co.* 44 Minn. 348, 46 N. W. 570; *Manton v. Seiberling*, 107 Iowa, 534, 78 N. W. 194.

Goss, J. This action is brought to foreclose a real estate mortgage. Defendant executed and delivered to J. G. Lund, of Minneapolis, Min-

nesota, his promissory note for \$1,000, dated February 20th, 1906, due February 20th, 1911, bearing interest at 6 per cent per annum according to five coupon notes. The principal note contained a permission to pay \$100, or any multiple thereof, on any interest payment date. These notes were secured by this mortgage upon land in Kidder county, North Dakota, duly acknowledged and there recorded. On April 19th, 1906, the notes were transferred for value by indorsement thereon by Lund, payee, to plaintiff, Cosgrave, accompanied by a written assignment of the real estate mortgage, which assignment was recorded in the office of the register of deeds of Kidder county April 24th, 1906. With the above loan and mortgage was also executed another loan between the same parties, of the same amount, on the same terms, and secured by a mortgage on another quarter section. Defendant paid Lund the interest for the first two years on each of these mortgages, as the interest became due, and received from Lund the interest coupon notes. Defendant had no notice or actual knowledge that Lund had assigned these notes and mortgages until a considerable time after he had paid Lund in full for both loans, under the supposition that Lund, the original mortgagee and payee, still owned all the notes and mortgages. Lund had previously sold to defendant the lands mortgaged. All parties, defendant, plaintiff, and Lund, were at all times mentioned herein residents of Minnesota; defendant residing at Frontenac, the other two in Minneapolis. On July 30th, 1907, defendant paid Lund \$400 due on the note and mortgage in suit, and obtained Lund's receipt therefor. Again, on November 13th, 1907, defendant paid \$1,000, to apply on the notes and mortgages, for which Lund receipted; and on September 1st, 1908, defendant paid him \$660, receiving from Lund a receipt in words as follows: "Balance due on mortgage, \$660. Received payment in full for mortgage." Defendant testified he made these payments, "supposing that Lund owned the notes and mortgages," and that he made the payments to Lund in person; that he did not ask to see the notes and mortgages, and was not informed that Lund did not own them; that on February 18th, 1908, at the time of making the last payment, he asked Lund for a release of the mortgage, and was informed that "it would take a few days for that, to send it up here and have it returned." "He said they were up here at Steele, and it would take a few days before he

could return it to me," speaking of the release of the mortgage. That defendant did not ask for the notes, assuming that the release of the mortgages, as he says, "covered everything." Several weeks after the final payment, Lund delivered defendant an abstract of title to the land in question, from an examination of which defendant first learned of the assignment of the mortgages to plaintiff. Defendant then demanded of Lund a release of the mortgages, but none was given, and thereafter, in July, 1908, Lund died. Lund never told plaintiff any of the money was received by him in satisfaction of the mortgage in suit. After the due date of the third interest coupon, plaintiff started foreclosure proceedings, declaring, under the terms of the mortgage, the aggregate of the principal and interest immediately due and payable.

The evidence therefore establishes that payment in full was made by the mortgagor to the mortgagee, and without actual knowledge of any assignment of the mortgage and negotiable notes by the mortgagee, but with the assignment of record in a foreign state where the land was situated. Does such payment discharge the debt and release the mortgage? In this connection the defendant by answer pleads the laws of Minnesota, "that the record of an assignment of a mortgage upon real estate shall not, in itself, be notice to the mortgagor of such assignment so as to invalidate any payment made by such mortgagor," and that the payment to Lund under the circumstances pleaded, and as above recited, under the laws of Minnesota, operated to discharge the debt and mortgage; also that all the parties were residents of Minnesota, that the notes and mortgage evidenced a Minnesota transaction having been there executed and delivered, and there performable, being there payable, and that the Minnesota law should be applied, and the debt decreed discharged and the mortgage declared satisfied. In support of the answer defendant has offered in evidence § 4183 of the General Statutes of Minnesota of 1894, reading:

"Record of assignment of mortgage—not notice to mortgagor.

The recording of an assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee."

Defendant has also offered in evidence as the construction placed

upon such statute by the supreme court of Minnesota, the decision of that court in *Olson v. Northwestern Guaranty Loan Co.* reported in 65 Minn. 475, 68 N. W. 100. Plaintiff respondent, on the contrary, contends that the Minnesota law is not controlling, but that the provisions of § 6167, Rev. Codes, 1905, and other statutory provisions of this state, should control the action here brought, as affecting title to real property here situated. Sec. 6167, Rev. Codes, 1905, reads:

“When the mortgage is executed as security for money due, or to become due, on a promissory note, bond, or other instrument designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond, or other instrument.”

It is noticeable that the Minnesota and North Dakota statutory provisions are radically different.

The defense is made upon the theory that the payment made by defendant to Lund extinguished the mortgaged debt, paid the negotiable notes, and therefore satisfied the mortgage upon the land in this state. The mortgage is but an incident to the notes, the evidence of the debt. The notes, mortgage as a security contract, and the mortgage assignment, are separate Minnesota contracts, stipulated to be performable in Minnesota, where the notes are made payable.

Under our statute, § 5350, Rev. Codes 1905, these several contracts are “to be interpreted according to the law and usage of the place where it is to be performed.” Had the place of payment not been stipulated, under § 5350 the contracts would have been interpreted “according to the law and usage of the place where it is made.” The stipulated place for performance and the place where made being identical, the Minnesota law as to the effect of the mortgagor’s alleged performance must be determined and applied. This law of the place of performance and of the place of contract “may be set up wherever suit may be brought.” *Dundas v. Bowler*, 3 McLean, 397, Fed. Cas. No. 4,141; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, with Wharton’s comment thereon in *Conflict of Laws*, § 427b; and also § 520 of the same work, as to the discharge of the debt under the law of Minnesota working a discharge everywhere; and *Story on Conflict of Laws*, 8th ed. § 287a, that the mortgage on land in a state foreign to place of pay-

ment "does not necessarily alter the locality of the contract," "or draw after it the consequence that the contract is to be fulfilled where the security is taken." To the same effect is Jones on Mortgages, 659, 660; Pingrey, Real Property, §§ 535 and 536; 27 Cyc. 1282. But the land fixes the necessary situs of the suit to foreclose as here (Rev. Codes 1905, § 6827), and leaves this court to determine the result of the payment made in Minnesota in performance of the Minnesota contract. The payment, to discharge either the mortgage or the negotiable mortgage debt, or both, must have been made to the holder of the note under the law of this state (Rev. Codes 1905, § 6167) as construed in Hollingshead v. John Stuart & Co. (Hollingshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89. This ruling will here apply as the law of this jurisdiction,—the situs of the property and the suit,—unless by foreign law proven as facts, in terms and construction, the foreign law of the place of payment is shown to be the contrary. And to so control, the foreign law must act upon the debt, as the land mortgaged is without the state of Minnesota, and the mortgage, though we may concede the same to be part of the Minnesota contract, must, as to its validity as a contract for security and its discharge by other means than by payment, be governed by the law of the place where the land is situated. Wharton, Conf. L. chap. 7; and particularly § 276d and § 276e, where matters going to the remedy and governed by the law of the forum are classified and distinguished from matters pertaining to the validity of the debt and its discharge by payment, which are to be determined by the law of the place of payment. Consult also: Dan. Neg. Inst. §§ 865–876; Randolph, Com. Paper, §§ 45–47 and 57; 27 Cyc. 1282; Jones, Mortg. § 661; Story, Conf. L. § 293c; and note to 31 Am. Dec. 264. In other words, the mortgage, considered as a separate chose in action,—a contract of security alone,—cannot be affected by this foreign statute, which statute, by its own terms, can operate only upon mortgages on land within the state of Minnesota. In order that this mortgage be discharged by said statute, then the proof concerning the foreign law must disclose that the payment made to Lund must, by force of said statute, operate to discharge the debt, in which case the mortgage, a mere incident to the debt, is, *ipso facto*, released, regardless of where the land pledged as security may be located.

Let us now consider the proof in such respect. The statute is as above quoted. *Olson v. Northwestern Guaranty Loan Co.* 65 Minn. 475, 68 N. W. 100, is in evidence upon the construction of the Minnesota statute, § 4183. The effect of the foreign law, if otherwise than would be discerned from the ordinary interpretation of it, must be established by proof as other facts are established. Otherwise, the construction of this statute should be here made as though it was a statute of this forum and according to the common-law interpretation thereof, if there be one. See cases cited in extensive notes in 67 L.R.A. 33 and 25 L.R.A. 449, at page 460; *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312; *Smith v. Bartram*, 11 Ohio St. 690; *Holman v. King*, 7 Met. 384; *Knapp v. Abell*, 10 Allen, 485; *Bowditch v. Soltyk*, 99 Mass. 136; *Hackett v. Potter*, 135 Mass. 349; *Dyer v. Smith*, 12 Conn. 384; *Hoes v. Van Alstyne*, 20 Ill. 202; 44 Century Dig. under Statutes, § 256; 16 Cyc. 884, subdivision C and 893; 36 Cyc. 1103 and 1104; 4 Wigmore, Ev. § 2573, that "the laws of other nations and states—not being laws of the forum at all, except by casual adoption—will not be noticed. . . . Relative to each other, the states of the United States are independently sovereign, and for the present purpose, foreign; hence their laws, equally with the laws of other nations, will not be noticed by the courts of any one of the United States." *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L.R.A. 271, 64 Am. St. Rep. 715, 26 S. E. 421; *App v. App*, 106 Va. 253, 55 S. E. 672. See also 1 Rice, Ev. pp. 36–65. *Olson v. Northwestern Guaranty Loan Co.* supra, is evidence as to the construction of the foreign law, and that, under the same, the payment made would satisfy the mortgage if upon Minnesota lands involved, but does not make the proof sought to be established by it, to the effect that the debt evidenced by this negotiable instrument is satisfied. Instead, construed with *White v. Miller*, 52 Minn. 367, at page 372, 19 L.R.A. 673, 54 N. W. 736, in evidence, the contrary would be the inference to be drawn where the note secured is negotiable. If these cases do not apply to the facts before us, there is then a failure of proof as to the effect of this payment upon the negotiable in notes in suit, and we are left to construe the statute in the light of either the law of this jurisdiction or of the common law. The foreign law, in the absence of proof, is presumed to be the common law. Rev. Codes, 1905, § 7317, subdivision

41. Under the law of this jurisdiction, the payment made does not discharge either the notes or the mortgage. Sec. 6107, Rev. Codes 1905, as construed in *Hollingshead v. Stuart & Co.* (*Hollingshead v. Globe Invest. Co.*) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89. Resorting to the common law, we find such payment would not satisfy these negotiable notes. While we cannot consult the Minnesota decisions not in evidence, to ascertain any peculiar interpretation by that court of the statute involved, we may resort to them to determine any common-law construction of such a statute, if there be any, and what the effect of such a payment was at common law. 67 L.R.A. 33, and note. Upon so doing, we find that the Minnesota decisions follow the common-law holdings, and that the notes are governed by the law merchant, and that negotiable instruments under the common law would be in no wise affected by this statute, applying to the mortgage alone as a recording statute where the debt secured is evidenced by negotiable notes. *Johnson v. Carpenter*, 7 Minn. 176, Gil. 120; *Hostetter v. Alexander*, 22 Minn. 559; *Blumenthal v. Jassey*, 29 Minn. 177, 12 N. W. 517; *Oster v. Mickley*, 35 Minn. 245, 28 N. W. 710; *Redin v. Branhan*, 43 Minn. 283, 45 N. W. 445; *White v. Miller*, 52 Minn. 367, 19 L.R.A. 673, 54 N. W. 736; *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311; *Watkins v. Goessler*, 65 Minn. 118, 67 N. W. 796.

The opinion in *Blumenthal v. Jassey*, in speaking upon a set of facts identical with these before us, except stronger in favor of the mortgagor, in that the land mortgaged was within Minnesota, concerning the operation of this same statute, that court says: "The statute relied upon by the defendant does not affect the case. . . . *Independent of this statute, a debtor* paying his debt (not evidenced by an immature negotiable instrument) to his creditors at any time before knowledge or notice of an assignment by the latter, in effect, discharges the *debt*, and a prior assignment gives no right of further recovery; but such payment after notice of assignment is no defense to an action by the assignee. Other parts of the recording law give to the record of certain instruments the effect of *constructive* notice of their execution. The effect of the statute quoted is simply to provide that the record of the assignment of a mortgage shall *not* have that effect. It leaves unchanged the law as to the effect of payments. In case the debt is evidenced by a negotiable instrument not yet mature, a payment to the

payee will not prejudice the right of recovery by a bona fide holder at maturity. *Such has always been the law* and the statute does not affect it." We know from the statute in evidence it is, like our similar § 6167, Rev. Codes 1905, a recording statute. We agree with the Minnesota court that such payment to the mortgagee has never at common law affected negotiable instruments in the hands of bona fide purchasers before maturity. At common law, presumed to be the law of Minnesota, in case we say there is a failure of proof of the construction of this statute in evidence, these notes are still unpaid. In the absence of this statute, the mortgage would at common law follow the negotiable character of the note, and not be discharged by this payment made. Assuming the mortgage to be a Minnesota contract, to allow the statute to discharge a mortgage upon lands without that state, without discharging the debt evidenced by negotiable notes secured by said mortgage, would be giving the statute of Minnesota extraterritorial effect, which cannot be done. The land here situated, then, is unaffected by the Minnesota recording act. There is, then, no defense based upon § 182 of the Minnesota statutes to the foreclosure of this mortgage to satisfy the existing debt so secured.

Another question arises on the record. Defendants have introduced in evidence the Minnesota law as interpreted in *White v. Miller*, 52 Minn. 367, 19 L.R.A. 673, 54 N. W. 736, under his contention that, as the principal note was not due at the time of the commencement of this action or at the date of the judgment appealed from, then, under such decision, "a negotiable promissory note due in the future according to its terms cannot be brought to immediate maturity through a clause in a mortgage given to secure the same, authorizing the mortgagee to declare the debt or note due upon default in any of the provisions found in the mortgage." Appellants claim it was error to enter the judgment for the debt evidenced by the principal note, which, under the Minnesota holding, was not due, and for which, under their procedure, no foreclosure could be had. Concede the mortgage to be, as it is under the rules governing conflict of law, a Minnesota contract, and that it was not entered into with any reference to the law of the place of its enforcement by foreclosure, and that at the commencement of suit and entry of judgment thereafter the notes had not matured, except two interest coupon notes due and unpaid. If this suit was to

foreclose land within that state, the case of *White v. Miller*, *supra*, would control, and foreclosure could be had only for the amount of the coupons due. But its enforcement by foreclosure is a matter of procedure or remedy only, and is governed by the law of this forum, where the land is located.

So, assume the principal note was not due, and that its due date could not be advanced by that clause of the mortgage purporting to so authorize; still it does not follow that judgment therefor cannot be rendered under the law of this forum merely because the debt to be collected by foreclosure is not due. Article 2 of chapter 30 of the Code of Civil Procedure, Revised Codes of 1905, and particularly § 7482, requires sale on foreclosure to be made in the county where the premises or some part of them are situated, and subsequent §§ 7484 to 7491, inclusive, expressly authorize foreclosure as made. See also the construction placed on these sections in *Scottish American Mortg. Co. v. Reeve*, 7 N. D. 99, 72 N. W. 1088. These provisions authorize a judgment as here entered, finding the amount owing plaintiff from the defendant, and empowering the court in its discretion to order the sale to recover upon a portion of the mortgage debt not due. Section 7491 authorizes the court to order a sale. If necessary, to collect a debt in part not due, and provides for a rebate or credit upon the debt of the interest that would accrue between the date of judgment and the maturity of the debt. In the words of the opinion in the case last cited: "Every defendant in a foreclosure action knows, whatever the prayer for relief may be, that the court, without reference thereto, will determine whether there ought not to be a sale of the whole security in one body, and the application of the proceeds of such sale to the extinguishment of the entire debt,—that which is not as well as that which is,—due." The principal note and the last interest coupon became due February 20, 1911. Judgment was entered September 28th, 1910. We may concede that the right to advance the due date according to the terms of the mortgage is not a mere matter of procedure, but instead is part of the Minnesota contract of security, and is governed by the Minnesota holding, and that the same cannot be done. Yet, as we understand the judgment entered, it includes interest only to the date of its entry, and not interest upon the principal note, figured to February 20th, 1911. The judgment as entered was rebated as to

24 N. D.—23.

this unearned interest, pursuant to § 7491, and is correct as to amount. The judgment appealed from is therefor ordered affirmed, foreclosure sale to be had pursuant to law as therein ordered. Respondent will recover costs of this appeal.

We here state that this opinion is written upon a rehearing had, and that our views have undergone a change since the original opinion was filed. We are now satisfied that the Minnesota statute, § 4183, cannot discharge the debt, and hence cannot constitute a defense.

MULROY v. JACOBSON.

(139 N. W. 697.)

Insurance policy contract — premium — rescission of contract.

1. An oral contract was entered into between these parties in April, 1909, whereby defendant promised and agreed to procure for plaintiff a policy of life insurance in the Mutual Life Insurance Company of New York, in exchange for the notes described in the complaint, which notes were owned by plaintiff and executed and delivered to him by the respective makers thereof. Pursuant to such contract, an application addressed to the insurance company was prepared by defendant, who was the local agent of such company, and plaintiff signed the same. Thereafter it was transmitted to such company and accepted by it, and a life policy in the sum of \$85,000, being the kind and amount of policy mentioned in the application, was issued and forwarded to defendant. After entering into the contract, plaintiff moved to New Mexico, leaving the notes and the mortgages securing the same in the bank at Walum for safe-keeping, of which bank defendant was cashier. Upon receiving notice of the issuance of the policy, defendant transmitted to plaintiff by mail the notes for indorsement, and also assignments of the mortgages for execution, with a letter requesting plaintiff to indorse such notes and execute the assignments and return same immediately, which request was complied with by plaintiff. Upon receipt of the notes and assignments, defendant forwarded the policy aforesaid to plaintiff, who refused to accept same and immediately returned it, giving as his reason for so doing that it was not the policy agreed upon, his contention being that he was to receive a one premium, or fully paid-up, policy for such an amount as the agreed value of the notes would purchase. Defendant's contention, on the contrary, was and is that an \$85,000 straight life policy was agreed upon, and that the first premium thereon was to be paid by defendant, in consideration for which the notes and mortgages in

question were to be indorsed and assigned to him. After some correspondence in which defendant refused to recognize the correctness of plaintiff's contention as to the contract, the latter notified the former in effect that he rescinded the contract and demanded the notes back. This was refused, whereupon this action was commenced for the alleged conversion of such notes and mortgages.

Held, that if plaintiff's version of the transaction is correct, he had a right, at his election, to rescind the contract and recover the notes or their value, and conversion will lie upon proving such rescission and demand, and refusal by defendant to comply therewith.

Conversion — evidence.

2. Under the complaint which contains the usual allegations in a conversion action,

Held, that proof of any facts tending to show a conversion of the notes and mortgages was admissible.

Application for insurance — contract — parol evidence — admissibility.

3. Plaintiff contends that the written application for insurance which he signed was in blank as to the amount of the policy applied for, and that such blank was later filled by defendant by the insertion of the figures \$85,000, without his knowledge or consent.

Held, that such application does not constitute the contract between these parties, but that such contract rests in parol; hence, the rules that parol evidence is inadmissible to contradict or vary the terms of a written contract, and that all prior or contemporaneous oral negotiations are merged in such written contract, have no application, and that it was not error to admit parol evidence to show what the terms of the contract in fact were.

Notes — value of — proof — conversion.

4. *Held*, for reasons stated in the opinion, that the proof as to the value of the notes at the date of the alleged conversion was sufficient.

Evidence — prejudicial error — self-serving declarations.

5. The crucial fact in controversy being whether the contract called for an \$85,000 straight life policy, as contended by defendant, or a one premium policy, as plaintiff contends,

Held, that it was prejudicial error to admit in evidence numerous letters written by plaintiff to defendant long after the contract was entered into, which letters contain merely self-serving declarations as to plaintiff's version of the transaction.

Evidence — "understanding" — error.

6. Plaintiff's son was permitted, over defendant's objection, to testify as to his *understanding* regarding the terms of the contract.

Held, prejudicial error.

Opinion filed January 16, 1913.

Appeal from District Court for Griggs County, *Goss*, Special Judge.

From a judgment in plaintiff's favor, and from an order denying a motion for a new trial, defendant appeals.

Reversed and new trial ordered.

Ball, Watson, Young, & Lawrence, for appellant.

Oral negotiations of the parties became merged in the written contract, and it was error to permit testimony as to the terms of such contract. *Taugher v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 747.

The legal effect of a contract of exchange of property is generally the same as that of a contract of sale. 35 Cyc. 40; Rev. Codes, § 5445; 28 Am. & Eng. Enc. Law, 664; *Hornblower v. Proud*, 2 Barn. & Ald. 327, 20 Revised Rep. 456; *Wait v. Baker*, 2 Exch. 1, 17 L. J. Exch. N. S. 307; *Emanuel v. Dane*, 3 Campb. 299; *Armstrong v. Allen*, 4 Reports, 107, 67 L. T. N. S. 738, 7 Asp. Mar. L. Cas. 293; *Martin v. Reid*, 11 C. B. N. S. 730, 31 L. J. C. P. N. S. 126, 5 L. T. N. S. 727; *Locke v. Reeves*, 116 Ala. 590, 22 So. 850; *Union Stock Yard & Transit Co. v. Mallory, Son & Z. Co.* 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888; *Rogers v. Miller*, 62 N. H. 131; *Feist v. Prince*, 22 Misc. 358, 49 N. Y. Supp. 280; *Stoneman v. Van Vechten*, 165 N. Y. 666, 59 N. E. 1131; *International & G. N. R. Co. v. Ogburn*, 26 Tex. Civ. App. 217, 63 S. W. 1072.

To maintain trover, plaintiff must have a *legal title*; equitable title alone not sufficient. 28 Am. & Eng. Enc. Law, 663.

Plaintiff must show possession, or legal right to possession, and general or special ownership of the property. *Parker v. First Nat. Bank*, 3 N. D. 87, 54 N. W. 313; *Clendening v. Hawk*, 8 N. D. 419, 79 N. W. 878.

Right of property and possession, or right to possession, must concur. *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Forth v. Pursley*, 82 Ill. 152; *Owens v. Weedman*, 82 Ill. 409; *Montgomery v. Brush*, 121 Ill. 513, 13 N. E. 230; *Frink v. Pratt*, 130 Ill. 327, 22 N. E. 819; 26 Am. & Eng. Enc. Law, 744; *Union Stock Yard & Transit Co. v. Mallory, Son & Z. Co.* 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 890.

Goods to be paid for in cash or by note, on arrival, do not prevent title from passing. 24 Am. & Eng. Enc. Law, 1561.

There was an assignment and delivery of the property, and it became the defendant's property. *Glass v. Basin & B. S. Min. Co.* 31 Mont. 21, 77 Pac. 302.

Plaintiff should be nonsuited, where it is shown that, prior to the commencement of action, he had parted with title to property involved. *Hall v. Simmons*, 125 Ga. 801, 54 S. E. 751; *Link v. Jarvis*, — Cal. —, 33 Pac. 206; *McDermott v. Morris Canal & Bkg. Co.* 38 N. J. L. 53; *Jones v. Clark*, 45 N. J. L. 437; *Treadwell v. Tillis*, 108 Ala. 262, 18 So. 886; *Whitcomb v. Hungerford*, 42 Barb. 177.

Action should have been for breach of contract. *Central Gas & Electric Fixture Co. v. Sheridan*, 1 Misc. 386, 22 N. Y. Supp. 76; *Zrskowski v. Mach*, 15 Misc. 234, 36 N. Y. Supp. 421; *Kearney Mill. & Elevator Co. v. Union P. R. Co.* 97 Iowa, 719, 59 Am. St. Rep. 434, 66 N. W. 1059; *Starr Bros. v. Stevenson*, 91 Iowa, 684, 60 N. W. 217; *Kramer v. Messner*, 101 Iowa, 88, 69 N. W. 1145.

A complaint charging defendant with the receipt of money under an agreement which he afterwards refused to perform, and asking damages for the breach, does not state a cause of action sounding in tort. *Link v. Jarvis*, — Cal. —, 33 Pac. 206; *Davis v. Thompson*, 10 Sadler (Pa.) 563, 14 Atl. 169; *Kinney v. South & North Ala. R. Co.* 82 Ala. 368, 3 So. 113; *McCormick v. Hadden*, 37 Ill. 370; *Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350; *Webster v. Granger*, 78 Ill. 230; *Tuxworth v. Moore*, 9 Pick. 347, 20 Am. Dec. 479; *Carter v. Willard*, 19 Pick. 1; *International & G. N. R. Co. v. Ogburn*, 26 Tex. Civ. App. 217, 63 S. W. 1072; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Benjamin, Sales*, ¶¶ 311-329; *Tufts v. Lawrence*, 77 Tex. 529, 14 S. W. 165; *Grant v. Walsh*, 36 Wash. 190, 78 Pac. 787; *Frech v. Lewis*, 218 Pa. 141, 11 L.R.A.(N.S.) 948, 120 Am. St. Rep. 864, 67 Atl. 45, 11 Ann. Cas. 547; *Hull v. Caldwell*, 3 S. D. 451, 54 N. W. 100; 24 Am. & Eng. Enc. Law, 619; *Voorhees v. Earl*, 2 Hill, 288, 38 Am. Dec. 588; *Cary v. Gruman*, 4 Hill, 625, 40 Am. Dec. 299; *Muller v. Eno*, 14 N. Y. 597; *Thornton v. Wynn*, 12 Wheat. 183, 6 L. ed. 595; *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605; *Taylor v. Saurman*, 110 Pa. 3, 1 Atl. 40; *Godwin v. Phifer*, 51 Fla. 446, 41 So. 597; *Harrington v. Rutherford*, 38 Fla. 321, 21 So. 283.

The alleged rescission of the contract was ineffective because plain-

tiff failed to restore, or offer to restore, benefits had by him. Rev. Codes, § 5380.

There must be proof of the value of the property, at date of conversion. *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608; *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 280, 91 N. W. 436.

Declarations of a party are inadmissible in his favor; they are merely self-serving. *Jones*, Ev. 2d ed. pp. 298, 299, 336; *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474; *Fisher v. Meek*, 38 Ill. 93; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638; *Fearing v. Kimball*, 4 Allen, 125, 81 Am. Dec. 693; *David v. David*, 66 Ala. 139; *Miller v. State*, 8 Gill, 141; *Hood v. Hood*, 2 Grant, Cas. 229; *Gayle v. Bishop*, 14 Ala. 552; *St. Louis, A. & T. H. R. Co. v. Thomas*, 85 Ill. 464; *Merritt v. Wright*, 19 La. Ann. 91; *Taylor*, Ev. ¶ 585; *Beaver v. Taylor*, 1 Wall. 637, 17 L. ed. 601; *Milne v. Leisler*, 7 Hurlst. & N. 786, 31 L. J. Exch. N. S. 257, 8 Jur. N. S. 121, 5 L. T. N. S. 802, 10 Week. Rep. 250.

W. C. Resser, for respondent.

There was no contract between the parties. A mere offer by one party and not accepted by the other party does not make a contract. *Bieber v. Beck*, 6 Pa. 198; *McKinley v. Watkins*, 13 Ill. 140; *Esmay v. Gorton*, 18 Ill. 483; *Brown v. Rice*, 29 Mo. 322; *Tuttle v. Love*, 7 Johns. 470; *Demoss v. Noble*, 6 Iowa, 530; *Corning v. Colt*, 5 Wend. 253; *Quick v. Wheeler*, 78 N. Y. 300; *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153; *Harlow v. Curtis*, 121 Mass. 320; *Smith v. Weaver*, 90 Ill. 392; *West v. First Presby. Church*, 41 Minn. 94, 4 L.R.A. 692, 42 N. W. 922.

Where new terms are introduced, they constitute an offer on the other side, and leave the question open. *Baker v. Holt*, 56 Wis. 100, 14 N. W. 8; *Ashcroft v. Butterworth*, 136 Mass. 511; *Stagg v. Compton*, 81 Ind. 171; *Bishop*, Contr. ¶ 323.

If applicant refuses to accept policy when issued, there is no completed contract of insurance. 25 Cyc. 714, and cases cited in note, 87.

Parol evidence is admissible to show application was filled up by agent, and that the answers of the applicant were falsified by the agent without applicant's knowledge. *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799.

FISK, J. Plaintiff seeks to recover damages for the alleged conversion of certain promissory notes of the face value of \$4,458, and alleged to be worth that sum. The complaint is in the usual form, alleging ownership and right of possession in plaintiff of the notes in question on April 14, 1909, and that on such date the defendant, having such notes in his possession, unlawfully converted and disposed of the same to his own use, to plaintiff's damage in the sum aforesaid.

The answer puts in issue the allegation as to plaintiff's ownership and right to the possession of the notes on April 14, 1909, or at any subsequent date, and alleges ownership and possession of such notes in himself at all times subsequent to April 10, 1909. He also denies both the conversion and the value of the notes as alleged in the complaint. The case was tried to a jury, and a verdict returned in plaintiff's favor for the sum of \$4,149.10. Thereafter defendant moved for judgment notwithstanding the verdict, or in the alternative for a new trial, which motion was denied, and he appeals both from the judgment and from the order denying such motion.

A brief statement of the facts out of which the litigation arose, and which statement we deem necessary to a proper understanding of the propositions of law involved, is as follows: Plaintiff, a farmer residing near Walum in this state, sold his farming property preparatory to moving to New Mexico, and on and prior to April 10, 1909, the notes in controversy were left in defendant's bank for safekeeping, the defendant being a banker at Walum. The latter was also local agent for the Mutual Life Insurance Company of New York, and he and the plaintiff had various negotiations regarding an exchange of such notes for certain life insurance on plaintiff's life. These negotiations culminated in an agreement for an exchange of some of such notes for life insurance, and pursuant thereto plaintiff made a written application through the defendant for a \$5,700 paid-up policy, in consideration for which he was to transfer to defendant a portion of the notes in controversy. Plaintiff desired to exchange all three of the notes for insurance, but defendant objected to one of the notes upon the alleged ground that it was of little or no value, but finally the parties effected a new agreement to supersede the first, whereby all the notes were to be transferred to defendant for another and larger policy, and a new application was signed by plaintiff in lieu of the former one. There

is a square conflict in the testimony of the parties as to the terms of the new agreement, it being plaintiff's contention that this second application was signed in blank to be subsequently filled for the amount of the *paid-up* insurance which all the notes would purchase; while defendant contends that, at the time it was signed by plaintiff, the blank space in such application, for the purpose of designating the amount of the policy, was filled in for the sum of \$77,000, and that such figures were subsequently changed to \$85,000, when it was later determined that all of the notes would purchase that amount on the annual premium plan. Plaintiff strenuously insists that the trade was for a fully paid-up policy, while defendant as strenuously insists that it was for a straight life annual premium plan policy. In other words, according to defendant's contention, the notes were to be exchanged for the first premium on a straight life policy calling for the payment of an annual premium. Immediately after signing the second application, plaintiff left for his new home in the south, and such application was forwarded to the insurance company in New York, and notice of its acceptance by the company was sent by wire to the general agent at Fargo, who communicated such fact to defendant at Walum. Thereupon defendant forwarded to plaintiff the notes, together with the assignments of mortgages securing the same, with a request that he indorse the notes and execute such assignments and return the same to him, which request was complied with. The defendant's letter of transmittal did not disclose the kind of policy which was issued. Upon receipt of the notes and assignments of mortgages, defendant transmitted to plaintiff an \$85,000 annual premium policy, but on its receipt plaintiff refused to accept it, and immediately returned same to defendant, accompanied by a letter stating his reasons for so doing, to the effect that it was not the policy agreed upon. Considerable correspondence ensued relative to the matter, but no adjustment of the dispute was effected. Later plaintiff caused a demand to be made on defendant for a return of the notes and mortgages, which demand was refused, whereupon this action was instituted.

Appellant assigns a large number of errors, but they are grouped and discussed in his brief under six general propositions as follows:

"1. Error of the court in permitting plaintiff to testify orally as to terms of a written contract of insurance, no issue having been made

as to whether said written contract was fairly or mistakenly entered into.

"2. The testimony offered by the plaintiff shows only a breach of contract, and not conversion, and plaintiff cannot recover for breach of contract in a conversion action.

"3. An alleged rescission of the contract in question was ineffective, because of failure of plaintiff to restore, or offer to restore, benefits received by him.

"4. There is no proof of the value of the property alleged to have been converted at the date of the alleged conversion.

"5. Error of the court in admitting in evidence several letters of plaintiff to this defendant, containing a statement of his claims in the controversy, and being merely self-serving declarations.

"6. Error of the court in permitting testimony in favor of the plaintiff in the nature of understandings and conclusions, and denying to the defendant testimony of conversations respecting the same matters."

1. Under his first proposition, appellant's contention is that plaintiff should not have been permitted to introduce parol testimony to show that the agreement was other than as disclosed in the written application signed by him. In other words, that, if plaintiff desired to prove that the written contract, as embraced in the application, does not embody the actual agreement between the parties, he must allege in the complaint facts showing either fraud or mistake or some ground for rescission. He invokes the familiar rule that, before being permitted to give evidence of prior oral negotiations, he must lay a foundation in the pleadings for proof of facts disposing of the written instrument. We think appellant is in error in such contention. Under his allegation of ownership of the notes and the conversion thereof by the defendant, we think he had the right to prove any facts tending to show the truth of such allegations. In other words, if conversion will lie under the facts as claimed by plaintiff, then he should be permitted to prove such facts under the complaint as framed. He cannot be required to plead mere evidentiary matter. If appellant's contention that conversion cannot be proved because of a lack of the necessary allegations in the complaint showing a right to rescind, then, upon like reasoning, conversion could not be proved under such complaint, even if the notes were obtained by fraud. We think this position unsound.

Any facts tending to show a ground for rescission and a rescission in fact by plaintiff, followed by a conversion of the notes by defendant by his refusal to recognize plaintiff's rights thereto after such rescission, would, we think, be admissible under the complaint. In other words, merely the ultimate facts constituting a cause of action need be alleged in the complaint. This is an elementary rule of Code pleading. But appellant's contention is, we think, predicated upon an erroneous premise. The contract between the parties was not reduced to writing. Hence, the rule of evidence invoked by appellant has no application. According to plaintiff's version of the transaction, oral negotiations took place between the parties which culminated in a proposal by defendant to procure for plaintiff a fully paid-up life insurance policy on his life, in consideration for which plaintiff was to transfer the notes in question to defendant, which proposal was accepted by plaintiff. Such agreement rested wholly in parol. Obviously, such parol agreement was wholly executory and conditional. It was to be consummated and, of course, could be consummated only when the policy was issued. Until such time as the insurance company accepted the application, it could not be known whether the contract could or could not be consummated. The appellant's counsel are, we think, clearly in error in contending that such written application for insurance embraced and constituted the contract between these parties. The contract was entered into prior to the making of such application,—how long prior being immaterial,—and such application was made merely as one step towards carrying out the deal. The contract was between these parties, and not between plaintiff and the insurance company. The written application was addressed to a third person, the insurance company, and was, at the most, merely a proposal for insurance. Manifestly, therefore, such proposal cannot correctly be said to constitute the agreement between these parties. It, no doubt, furnishes strong corroborative evidence of defendant's contention as to the kind of a policy that was agreed upon, but it is not conclusive of such fact, and its probative weight may be impaired or wholly destroyed by parol evidence as to the actual agreement. This appears to be plain, and we believe sufficiently answers appellant's contention as to the admissibility of the parol evidence objected to, but which was received to show what the terms of the contract actually were.

2. Appellant's contention that plaintiff's proof merely shows a breach of contract, and not a conversion as alleged, is, we think, also unsound. His premise is that title to the notes passed unconditionally to defendant pursuant to the contract, and there being no question of fraud, deceit, or mistake in the transaction, a rescission could not be had. Such contention is plausible, but we think a little reflection, in the light of the facts, will show its fallacy, as well as serve to differentiate the cases relied on by appellant's counsel from the case at bar. Plaintiff did not sell and deliver the notes to defendant for a stated price to be paid by him in the future, or at all. There was not an executed sale or exchange of the notes to defendant, as contended, but, according to plaintiff's theory, he agreed merely to exchange the notes for a certain designated policy of life insurance to be purchased by defendant, and the notes were transferred pursuant thereto. Such transfer was not unconditional, as is contended by appellant, but was made as and for payment of the policy which defendant had agreed to procure. On the contrary, if the contract was for an annual premium life policy, as defendant contends, then, of course, defendant had a contract right to retain the notes, and conversion will not lie. There is no claim of a mutual mistake between the parties, nor of actual fraud or deceit. They each assert that there is a contract, but they differ as to the terms thereof. Assuming that plaintiff is correct as to the terms of the contract, he no doubt might have sued for a breach thereof instead of for conversion of the notes, but he was not restricted to such remedy. He had a right to rescind at his election, and the proof shows that he did rescind. Appellant calls our attention to the fact that plaintiff, as late as the latter part of May, expressed his willingness to accept from defendant a performance of the contract, and that therefore no rescission had taken place at that time; but such conclusion does not necessarily follow from the above fact. Immediately upon receiving the \$85,000 policy, he returned it and demanded the policy which he claimed had been agreed upon, or a return of the notes, and subsequently, in a letter to defendant, he unqualifiedly rescinded the contract and notified defendant that he might either retain the notes for collection, or return them to him. The fact that thereafter he expressed a willingness to permit defendant to go on with the deal, but

which proposal was ignored by defendant, would not operate to reinstate the contract.

We are therefore agreed that the trial court did not err in admitting parol evidence to show what the contract between the parties was. We are also agreed that plaintiff has not mistaken his remedy, provided he is able to establish that the contract was as contended for by him, and that such contract was rescinded.

In the light of the above observations, the rights of these parties are, we think, quite plain. At the most, defendant acquired merely a conditional title to the notes, dependent upon his furnishing to plaintiff the policy agreed upon. If a one payment policy was agreed upon, as plaintiff contends, then, upon defendant's failure or refusal to procure and deliver such a policy, plaintiff had the undoubted right to rescind the deal and sue for the notes or their value, and defendant's refusal to recognize plaintiff's claim thereto would constitute a conversion thereof.

We fail to appreciate the force of appellant's contention that a rescission could not have taken place "because of failure of plaintiff to restore, or offer to restore, benefits received by him." He received no benefits under the contract, and he promptly restored to defendant the policy which was transmitted to him. Such policy was at no time effective, and was immediately returned. Under plaintiff's version of the contract, the so-called De Lap paper constituted no part of the consideration. We think this sufficiently answers the first three propositions advanced by appellant's counsel.

It is next contended that there is no proof of the value of the notes alleged to have been converted. There is no merit in this point. While the evidence on this question is not as specific as it might have been, we are convinced that when considered in the light of the presumption that the notes were worth their face value, it is sufficient. The decisions of this court cited by appellant, involving the sufficiency of proof as to the value of grain, are not in point. There is no analogy between the case at bar and cases for the conversion of commodities having a fluctuating value, such as grain. The court will take judicial notice that the market value of grain fluctuates almost daily and sometimes hourly. Hence, the rule regarding proof of the value

of such commodities as grain has but little, if any, application in a case such as this.

This brings us to a consideration of the correctness of certain rulings of the district court on the admission of testimony in the form of letters written pro and con between the parties subsequent to entering into the contract. In considering the alleged errors under this branch of the case, we must not lose sight of the fact that the crucial issue of fact was, Which party is correct as to the terms of the contract which was entered into? The receipt of such letters, if error at all, was of the most prejudicial character, for the jury was permitted to take them to the jury room for perusal by the members thereof during their deliberations. After mature deliberation, we are constrained to hold that the receipt of most of such letters constituted palpable error, necessitating a new trial. In giving our reasons for this holding, we deem it unnecessary to go into details, and shall content ourselves by a general statement of our views. Plaintiff was personally in court and testified to the material facts sought to be proved by these letters. The fact that he declined to accept the \$85,000 policy and immediately returned same to defendant, and that defendant received the same, as well as the fact that the notes and assignments of mortgages were forwarded by defendant to plaintiff for indorsement and transfer, and that the same were returned by mail to defendant after being indorsed and transferred, were all testified to by plaintiff, and are wholly uncontroverted. Plaintiff's letter, Exhibit 6, could therefore serve no legitimate purpose, and should have been excluded, as it contains many self-serving declarations of a very prejudicial character regarding a past transaction, and could only serve to mislead and poison the minds of the jurors to defendant's detriment. The same may be said of Exhibit 7, being another letter written by plaintiff to defendant, with the exception that this letter was, no doubt, admissible for the sole purpose of proving a rescission of the contract by plaintiff and the imparting of notice thereof to defendant. It should be thus restricted. Exhibits 8 and 9 are letters written by plaintiff to defendant in May of said year, and contain nothing but self-serving declarations as to plaintiff's version of the contract. They are clearly incompetent and highly prejudicial to defendant, and should have been excluded. Num-

erous letters written by defendant to plaintiff regarding the contract were introduced in evidence by the plaintiff without objection, most, if not all of which, were likewise incompetent, except to the extent, if any, that they contain admissions favorable to plaintiff. The introduction of these letters, without objection by defendant, did not, however, warrant the court in receiving in evidence the letters written by plaintiff to defendant as aforesaid, even though they were replies to defendant's said letters.

If authorities are necessary in support of the rule that the above-mentioned letters written by plaintiff are inadmissible, see *Learned v. Tillotson*, 97 N. Y. 1, 49 Am. Rep. 508; *Canadian Bank v. Coumbe*, 47 Mich. 358, 11 N. W. 196; *Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727; *Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009; *State, Hand, Prosecutor, v. Howell*, 61 N. J. L. 142, 38 Atl. 748; *Bank of British N. A. v. Delafield*, 126 N. Y. 410, 27 N. E. 797; *Jones, Ev.* pp. 336, 374, 375; *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474; *Fisher v. Meek*, 38 Ill. 93; *Fearing v. Kimball*, 4 Allen, 125, 81 Am. Dec. 690.

The errors above pointed out necessitate a new trial, and, in view of this disposition of the appeal, we deem it necessary, for the guidance of the trial court, to pass on but one other ruling complained of by appellant. The vital and controlling issue between these parties was whether the contract in fact called for a one premium policy or a straight life annual premium policy. The plaintiff sought to show that the contract was for a one premium policy, and he was permitted, over defendant's objection, to corroborate his version of the contract by the testimony of his son, who was permitted to testify to his understanding of the deal from the conversation of the parties, instead of being required to detail such conversation. We think this ruling was not only clearly erroneous, but manifestly very prejudicial in view of the record presented on this appeal.

The judgment and order appealed from are reversed and the cause is remanded for a new trial in accordance with the views above expressed.

Goss, J., being disqualified, took no part in the above decision.

McKINNON, Thiel, Hafener and Leines, Suing on Behalf of Themselves and all Other Persons Similarly Situated, v. ROBINSON, Ebel, Polfuss, Carlson and Slotmoe, Constituting the Board of County Commissioners of Richland County; Mikkelson, as County Treasurer of Richland County; Burton, as County Auditor of Richland County; Richland County, a Municipal Corporation; Ingemann, Jorgenson, and Ingemann, Copartners as Ingemann & Company; Buechner and Orth, Copartners as Buechner & Orth.

(139 N. W. 580.)

Counties — county buildings — unlawful contract — unlawful expenditures of public funds — interest of taxpayers therein.

1. Plaintiffs, as residents, citizens, and taxpayers of a county, have such an interest as entitles them to maintain an action in their behalf and in behalf of all others similarly situated, to enjoin the carrying out by the officials of the county of an unlawful contract requiring an extraordinary expenditure of public funds in the erection of a courthouse.

Counties — county buildings — unlawful contract — injunction — pleading.

2. In an action by citizens and taxpayers to enjoin county officials from carrying out a contract for the construction of a courthouse, *held*, that the complaint is not vulnerable to attack by demurrer upon the ground that it fails to allege facts sufficient to constitute a cause of action; it appearing from such complaint that the proposition for the construction of such courthouse was not submitted to a vote of the electors of the county, and also that the alleged contract is voidable for other reasons stated in the opinion.

Opinion filed December 31, 1912. Modification denied January 22, 1913.

Appeal from District Court, Richland County, *Frank P. Allen, J.*

A demurrer to the complaint having been sustained, judgment was rendered for defendants, from which plaintiffs appeal.

Note.—In harmony with the above case, the courts generally hold a taxpayer to be the proper party plaintiff to maintain an action for injunction to restrain the building of a courthouse, where the authorities are proceeding illegally, as shown by the note in 36 L.R.A.(N.S.) 18, which reviews the authorities on the question of the right of a taxpayer, in the absence of statute, to enjoin unlawful expenditures by municipality. See also notes in 2 Am. St. Rep. 92 and 64 L.R.A. 619.

The complaint is as follows:

I.

"That the plaintiffs, and each of them, are residents and citizens of the county of Richland and state of North Dakota, and that they, and each of them, own a large amount of real and personal property, situated within said county and state, upon which they pay, and have paid for many years, a large amount of money in taxes, and that they bring this action on their own behalf and on behalf of all other residents and taxpayers of said Richland county similarly situated.

II.

"That the defendants W. J. Robinson, C. H. Ebel, John C. Polfuss, L. A. Carlson, and P. E. Slotmoe are now and were on the 27th day of February, 1912, and for a year or more prior thereto, the duly elected, qualified, and acting county commissioners in and for the county of Richland and state of North Dakota, and together constitute the board of county commissioners of said Richland county, as the same is organized and exists by the laws of the state of North Dakota.

III.

"That the defendant Karl L. Mikkelsen is now and was on the 27th day of February, 1912, and for a year or more prior thereto, the duly elected, qualified, and acting treasurer of the county of Richland and state of North Dakota.

IV.

"That the defendant F. A. Burton is now and was on the 27th day of February, 1912, and for a year or more prior thereto, the duly elected, qualified, and acting auditor in and for the county of Richland and state of North Dakota.

V.

"That the defendants V. Ingemann, L. P. Jorgenson, and G. Inge-

mann are now, and were during the times hereinafter stated, copartners doing business under the firm name and style of Ingemann & Company.

VI.

"That the defendants Chas. W. Buechner and Henry W. Orth are now, and were during the times hereinafter stated, copartners doing business under the firm name and style of Buechner & Orth.

VII.

"That on the 14th day of July, 1903, the Board of county commissioners in and for said Richland county, at a meeting thereof, passed and adopted the following resolution, to wit:

" 'Whereas, the courthouse of Richland county is inadequate to meet the demands and needs of the public, and is also becoming unsound and in need of repairs, and that it will be necessary from time to time to incur expense in making such repair or to add to the present structure,

" 'Therefore, be it resolved, that in order to meet such expense a building fund is hereby created, same to be known as "courthouse building fund," which shall be raised and maintained by a general tax levied on the taxable property within the county, the amount of the levy to be made yearly and within the discretion of this board.'

VIII.

"That thereafter, and acting under said resolution and without any other right or authority of law, the said board of county commissioners levied upon the taxable property situated in said Richland county the following amounts of money, to wit:

- "In the year 1903, the sum of \$4,625.31
- "In the year 1904, the sum of \$4,708.01
- "In the year 1905, the sum of \$4,835.98
- "In the year 1906, the sum of \$4,934.67
- "In the year 1907, the sum of \$4,972.84
- "In the year 1908, the sum of \$5,009.38
- "In the year 1909, the sum of \$5,597.06
- "In the year 1910, the sum of \$5,200.68

IX.

"That the greater part of the amounts so levied has been paid, and that the same was paid for the purposes stated in said resolution, to wit, for the purpose of repairing and adding to the present courthouse of said Richland county, and was so collected by the county treasurer of said Richland county and credited to the court house building fund upon his books.

X.

"That at a meeting of the board of county commissioners in and for said Richland county, held on the 24th day of July, 1911, the defendant F. A. Burton, as county auditor, filed with the said board of county commissioners his estimate of the expenses of said county for the fiscal year, and included in said statement the sum of twenty-four thousand dollars (\$24,000) for the court house building fund, and at said meeting of said board, the following resolution was duly passed and adopted by said board of county commissioners, to wit:

"And it is further ordered that an emergency existing in that the present courthouse is inadequate, unsafe, and unsanitary, and must be replaced by a new one, and the fund for such building is insufficient, and such building may have to be constructed within the next year, and before another tax can be levied.

"Therefore, a tax be and is hereby levied upon the taxable property in said Richland county, in addition to the foregoing levy for the year 1911, in the amount of \$24,000 for a courthouse building fund.'

XI.

"That thereafter, the defendant F. A. Burton, as county auditor, levied and extended upon the tax lists of said Richland county for the year 1911, under the heading 'courthouse building fund, emergency,' the sum of twenty-two thousand seventy-nine dollars and twenty-five cents (\$22,079.25).

XII.

"That a part of the amount so levied for the year 1911 has been paid, and that the same was paid for the purposes stated in said resolution, last above mentioned, and was collected by the defendant Karl L. Mikkelson, as county treasurer, for such purpose, and credited by him to the courthouse fund on his books.

XIII.

"That the question of the construction of a courthouse, the question of the levy of said tax for the year 1911, or the taxes levied for the years 1903 to 1910 inclusive, or any of said questions, was never at any time submitted to the voters of said Richland county at any general or special election, and said county commissioners were never authorized to levy such taxes or to construct said courthouse.

XIV.

"That on or about the 8th day of December, 1911, said defendants constituting the board of county commissioners, without any right or authority, proceeded to take steps to tear down the old court house, which plaintiffs allege was in good condition and suitable for the business of said county, and to contract for the erection of a new courthouse and boiler house upon the ground occupied thereby; and on said date the said board entered into a contract with the defendants Beuchner & Orth, who are engaged in the business of architects at St. Paul, Minnesota, whereby they attempted to obligate said Richland county to employ said defendants Buechner & Orth, as architects to prepare plans and specifications for such new courthouse, and to pay them the sum of 3 per cent, which amounts to about the sum of three thousand dollars (\$3,000) for their services in preparing said plans and specifications; and further provided that said Richland county should pay said defendants Buechner & Orth, the further sum of 1½ per cent of the contract price, or about the sum of fifteen hundred dollars (\$1,500) more, in case said board of county commissioners

should request said defendants to superintend the work of building said courthouse.

XV.

"That on the 12th day of January, 1912, said defendants, the board of county commissioners, accepted and adopted certain plans and specifications for a new courthouse and boiler house, and instructed the defendant county auditor to advertise for bids for the construction of same, to be received on the 26th day of February, 1912; that such plans and specifications do not call for a completed courthouse, and expressly except therefrom heating, ventilating, electric wiring, gas fitting, plumbing, vault doors, vault windows shutters, counters, bar railings and furniture, and provide that such work will be let in separate contracts; that no estimate of the costs of such additional work has ever been made or filed with said board of county commissioners. That no estimate of the cost of constructing said courthouse and boiler house was ever made or filed. That said specifications failed to designate the specific materials of which said courthouse would be constructed, but provide that separate and alternative bids should be submitted upon Kettle river sandstone, Marquette rain drop, Ortonville and St. Cloud granite, Blue Bedford limestone, semi-glazed terra cotta, and Hebron grey pressed brick for the exterior, and upon Tennessee, Vermont, and Italian marble for the interior; and that the defendants board of county commissioners would not make a selection of such materials until after bids were received and opened. That said provisions tended to, and did, prevent free and open competitive bidding upon such work, many contractors were thereby deterred from bidding upon said work, and it was thereby rendered impossible to determine which of the bidders was the lowest bidder, at least prior to the selection by said board of county commissioners of said material.

"That said specifications also failed to designate specifically the kind or quality of hardware to be used in the construction of said building, and permitted a change to be made from the kind and quality of hardware named therein after the contract should be let.

XVI.

"That on the 26th day of February, 1912, such bids as had been presented for the construction of said courthouse and boiler house were examined by the defendant board of county commissioners, and said board after examining said bids, and not before, determined upon the kind of materials to be used, as aforesaid, the journal of said board stating:

"Each bidder submitted a number of bids to cover the variety of materials to be considered per specifications. After a consideration of the bids, the board decided to use the following materials for the building: Kettle river sandstone rough faced, for the basement story, Blue Bedford cut stone for the upper stories, and Italian marble, English vein, for the interior finish.'

"That said defendants then and there, without any such competitive bidding as is contemplated by law, let said contract for the construction of said courthouse and boiler house to the defendants V. Ingemann, L. P. Jorgenson, and G. Ingemann, copartners as Ingemann & Company, as stated in the resolution adopted by said board of county commissioners as follows:

"The bid of Ingemann & Company, with the allowance for old courthouse, being the lowest bid, the board on motion awarded the contract to said firm at the amount of \$100,350. A subsequent agreement with the said company for tooling the edges of the rough-faced stone in the basement story added \$500 to the contract price, making the same \$100,850; and the board on motion authorized the drawing up of the contract with Ingemann & Company, Merriam Park, Minnesota, for the erection of a courthouse and boiler house, as per plans and specifications, for the amount of \$100,850.'

"That said defendants Ingemann & Company were not the lowest bidders, and said contract was not awarded to the lowest bidder; that no specifications for the additional contract for tooling said stone were made or filed, no estimate of the cost thereof was made, and no bids were received or considered therefor, and that defendants the board of county commissioners, thereby altered the conditions under which the other persons and firms bid upon said work and favored said defendants Ingemann & Company, and awarded them the contract

for the construction of said courthouse for the sum of \$100,850, while at least one bidder, one Chas. Skooglum, was a lower bidder, he bidding the sum of \$100,409 for constructing said courthouse and boiler house, according to the manner in which said defendants selected the materials for said building.

XVII.

"That on the 27th day of February, 1912, the defendants board of county commissioners made and entered into a contract in the name of Richland county, with the defendants, Ingemann & Company, by which said board of county commissioners agreed that Richland county should pay to the said Ingemann & Company the sum of \$100,850 for the construction of said courthouse and boiler house, according to the plans and specifications aforesaid, said board then and there taking the following proceedings, as shown by its journal:

" 'The written agreement between Ingemann & Company and Richland county, North Dakota, in the matter of contract for the erection of courthouse and boiler house, was submitted and read. After some changes had been made in said agreement, Commissioner Ebel moved that Chairman Sletmoe be authorized and empowered to sign same, which motion was seconded by Commissioner Robinson, and motion carried.'

XVIII.

"That said contract was executed by defendant Sletmoe on behalf of said defendant Richland county, and by said defendants Ingemann & Company, on said 27th day of February, 1912, and that at the time of the execution of said contract and incurring the indebtedness for the construction of said courthouse and boiler house in the sum of \$100,850, said defendants board of county commissioners, and Richland county, or either of them, had not then, nor at any time before or since, made any provision for the collection of an annual tax to pay the interest or principal when due; that said indebtedness was largely in excess of the amount that could be expended for that purpose from the annual revenue of said Richland county for the current year; that

there was on hand at the time of the execution of said contract the sum of not more than \$81,454.53 in the courthouse building fund derived from all sources, and the sum of not more than \$3,159.91 in the interest and penalty fund, or a total of not more than \$84,614.44, and there were and are no other funds of said Richland county which can be secured or expended for such purpose; that of the amount in said courthouse building fund, as aforesaid, a large amount has been diverted by the defendants board of county commissioners, from the funds of the several drainage districts on the books of the county treasurer, by transferring or paying into the interest and penalty fund all penalty and interest collected by the county treasurer on drainage assessments paid prior to July 1, 1911, and thereafter transferring the amount of such penalty and interest, and paying the same into the said courthouse building fund; that the amount of such penalty and interest is unknown to plaintiffs, but plaintiffs are informed and believe, and therefore allege, that the same amounts to several thousands of dollars, and that as shown by the books of defendant the county auditor, there was transferred from the interest and penalty fund into said courthouse building fund, the following amounts:

“On July 12, 1904, the sum of \$6,297.34;

“On March 5, 1907, the sum of \$15,000;

“On January 4, 1909, the sum of \$11,722.57;

“In July, 1910, the sum of \$6,000;

“In July, 1911, the sum of \$6,000.

“That this court has held in the case of Viking township against the defendant Karl L. Mikkelsen, as county treasurer, which case is now pending upon appeal to the supreme court, that such penalty and interest does not belong to said Richland county, but to the several drain funds to which the principal of said assessments belongs; and by such decision said defendant was ordered and required to transfer such interest and penalty involved in that case, to Viking drain No. 14; and that there is also pending in this court, and undetermined, another case involving the same questions of law and facts, entitled State of North Dakota ex rel. Walcott Township et al. versus said defendant, the County Treasurer, the object of said action being to procure a writ of mandamus to require said defendant to transfer to said drain funds, the balance of such penalty and interest.

XIX.

"That the defendants board of county commissioners have acted throughout the proceeding for the construction of said courthouse and boiler house, and in the levy of the taxes hereinbefore mentioned, the creation of said courthouse building fund, the determination of the question of whether or not said courthouse should be built, and the manner of paying for same, and what amount the same should cost, without in any manner submitting said questions, or any of them, to a vote of the people and taxpayers of said Richland county, but have acted solely according to their own personal desires and wishes in the matter, and without any warrant or authority of law for their acts.

XX.

"Plaintiffs further allege that the said contract made with defendants Ingemann & Company does not properly protect the interests of the taxpayers and people of Richland county, and that under the conditions of same, power and authority is delegated by said defendants board of county commissioners, to said defendants, Buechner & Orth, to materially alter and vary the specifications upon which said bids were received, and to increase and add to the price bid by said defendants Ingemann & Company, as they may desire, and that the people and taxpayers have no accurate knowledge of the amount that may be expended by said defendants board of county commissioners, in the execution of said contract alone, and no knowledge or information of any kind as to the amount of money that will be expended, or will be necessary to complete said courthouse, so that same will be ready for occupancy. That, among other things, it is provided in said contract as follows:

"'No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price;' and that in case the value is not agreed upon, said amount shall be fixed by three persons to be selected.

"That it is provided in said contract that the certificates of the architect shall be conclusive on the county and on the contractor.

"That it is also provided therein that the building shall be completed by August 1, 1913; that payments shall be made upon said contract to the amount of 70 per cent of the architect's certificate of work done and materials furnished every thirty days, and that the balance of 30 per cent shall be retained until said building is completed.

XXI.

"That said defendants board of county commissioners, Ingemann & Company, and Buechner & Orth have begun to carry out said contract, and to tear down the old courthouse, and threaten to, and will, unless restrained by this court, further carry out said contract by constructing said new courthouse, and that defendants board of county commissioners, F. A. Burton, county auditor, and Karl L. Mikkelsen, county treasurer, threaten to and will, unless restrained by this court, issue to the said Ingemann & Company, in payment of such work, the warrants of said Richland county, and pay the same out of said courthouse building fund, or other funds belonging to said Richland county, and will dissipate and divert the funds of said county, and use money not subject to be used for such purpose, in the construction of such courthouse and the carrying out of a contract which is void and without the power and authority of said defendants to make on behalf of said Richland county.

XXII.

"That the plaintiffs are without any remedy at law, and unless the defendants are enjoined from carrying out said contract and issuing and paying the warrants of said Richland county in payment of such work, the plaintiffs and the taxpayers of said county will suffer irreparable injury in the payment of their taxes and the amount thereof.

"Wherefore, plaintiff prays the judgment of this court:

"1. That the defendants, and each of them, jointly or severally, or by their agents or servants, be permanently restrained and enjoined from in any manner carrying out said contract so made with the defend-

ants Ingemann & Company, and said contract so made with the defendants Buechner & Orth, and each of them, and that such contracts, and each of them, be adjudged null and void.

"2. That said defendants constituting the board of county commissioners and their successors in office, and the said defendant F. A. Burton, and his successors in office, as county auditor, be permanently restrained and enjoined from in any manner issuing the warrants of said Richland County, or permitting or authorizing the issuance of such warrants, in payment of the amount of said contracts, or either of them, or any part of such amount, and that the defendant Karl L. Mikkelson, and his successors in office, as county treasurer, be permanently restrained from in any manner paying or permitting or authorizing the payment of any of the moneys of said Richland county in carrying out said contracts, or either of them.

"3. That said defendants, and each of them, be permanently restrained and enjoined from in any manner proceeding to construct a courthouse, and from levying and collecting, or attempting to collect, any tax or taxes for such purpose, unless they shall first submit the question of the construction of such courthouse, and of the levy of such taxes, to a vote of the people of said Richland county at an election duly called, as provided by law.

"4. That a restraining order, in the same form, issue, pending the determination of this action.

"5. That plaintiffs have such other and further relief in the premises as shall be just and equitable, and that they recover of defendants their costs and disbursements incurred therein."

The grounds of the demurrer are:

"1. That said complaint fails to state facts sufficient to constitute a cause of action against the defendants or any of them.

"2. That the plaintiffs have no such special interest in the subject-matter of said action as authorizes them to bring said suit."

Pierce, Tenneson, & Cupler, for appellants.

A resident and taxpayer of the municipality may maintain an action to enjoin municipal officers from exceeding their authority in making or carrying out public contracts. *Engstad v. Dinnie*, 8 N. D. 11, 76 N. W. 292; *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Fox v.*

Walley, 13 N. D. 610, 102 N. W. 161; Weatherer v. Herron, 25 S. D. 208, 126 N. W. 244; 22 Cyc. 897.

Proper to join as plaintiffs "all other persons similarly situated." Webster v. Douglas County, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885, 78 N. W. 451; 1 Winslow, Forms, 522-524; 30 Cyc. 133; 16 Cyc. 191.

Under code practice, there is no distinction between actions at law and suits in equity. Rev. Codes, Sec. 6767.

Facts in suit in equity need not be more distinctly alleged in the complaint than in other civil actions. Swenson v. Swenson, 17 S. D. 558, 97 N. W. 845; Rev. Codes, Sec. 6851; 31 Cyc. 288.

Contract to the common-law rule, every reasonable intendment and presumption is to be made in favor of the pleading. Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; McConnon & Co. v. Laursen, 22 N. D. 604, 135 N. W. 213; Donovan v. St. Anthony & D. Elevator Co. 7 N. D. 518, 66 Am. St. Rep. 674, 75 N. W. 809; Bliss, Code Pl. 2d ed. § 425-a; Tisdale v. Ward County, 20 N. D. 401, 127 N. W. 512.

Pleading may be made definite and certain, by amendment. Rev. Codes, Sec. 6870.

Where the substantial facts are stated in the complaint, although the allegation of such facts is imperfect and incomplete as to form, the proper mode of correction is by motion to make the averments more definite and certain, rather than to raise question by demurrer. Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; Johnson v. Great Northern R. Co. 12 N. D. 420, 97 N. W. 546; 6 Enc. Pl. & Pr. 276; Bliss, Code Pl. 2d ed. § 425-315.

Variance in the allegations of a complaint is not ground for demurrer, but must be reached by motion. 31 Cyc. 300; Walters v. Chance, 73 Kan. 680, 85 Pac. 779; Phillips v. Runnels, Morris (Iowa) 391, 43 Am. Dec. 109; Mahan v. Sutherland, 73 Me. 158; Barrett v. Jones, 21 Ark. 455; Mullins v. Hume, 15 Ky. L. Rep. 93; McDonough v. Kane, 75 Ind. 181; Bliss, Code Pl. 2d ed. § 314.

A pleading should be construed so as to support the declaration, in the sense intended, rather than to defeat it. Bliss, Code Pl. supra; Donovan v. St. Anthony & D. Elevator Co. 7 N. D. 519, 66 Am. St. Rep. 674, 75 N. W. 809.

Under the codes, the allegation of a legal conclusion does not usually render the pleading open to demurrer. 31 Cyc. 280; *Weber v. Lewis*, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; *Bliss*, Code Pl. 2d ed. 214; *Tisdale v. Ward County*, 20 N. D. 401, 127 N. W. 512; *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809.

Commissioners of a county have no authority to levy taxes for an "extraordinary purpose" without first submitting the question to a vote of the people of the county. The expenditure of money for the erection of a courthouse is an "extraordinary expenditure," and the commissioners are without authority to raise money for such purpose by taxation, in the absence of an affirmative. *McNutt v. Lemhi County*, 12 Idaho, 63, 84 Pac. 1054; Rev. Codes, Secs. 2405-2406; Chapter 67, Laws 1909.

The commissioners cannot do indirectly what they are not permitted to do directly, and thus violate statutes intended to guard the rights of the taxpayers. Const. Secs. 130, 175.

The question must be submitted to a vote of the people. Atty. Gen. ex rel. *Gibson v. Montcalm County*, 141 Mich. 590, 104 N. W. 792.

An annual tax to pay principal and interest must first be provided for. 11 Cyc. 461, 462, 507, 508; Rev. Codes, Sec. 2419; Constitution, Sec. 184; State ex rel. *Diebold Safe & Lock Co. v. Getchell*, 3 N. D. 243, 55 N. W. 585.

The words "current year," used in the statute, mean "fiscal year," or the year computed from the time of one levy until the following levy. *Clark v. Lancaster County*, 69 Neb. 717, 96 N. W. 598; *Johnson v. Becker County*, 27 Minn. 64, 6 N. W. 411; *Rogers v. Le Suer County*, 57 Minn. 434, 59 N. W. 488; *Kiichli v. Minneapolis Brush Electric Co.* 58 Minn. 418, 49 Am. St. Rep. 523, 59 N. W. 1088; *Johnson v. Norman County*, 93 Minn. 290, 101 N. W. 180.

Because of the provisions of the specifications and contract, and because of the manner in which the bids were called for and the contract let, the contract is void. Rev. Codes, Sec. 2421; 2 Dill. Mun. Corp. 5th ed. § 807; *Wells v. Burnham*, 20 Wis. 116.

The public must be protected against collusive contracts, etc. State ex rel. *Whedon v. York County*, 13 Neb. 57, 12 N. W. 816; *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645, 13 L.R.A. 357, 17 S. W. 7.

Bids for such contract and work must be competitive, and all bidders must start on a common ground and bid for a definite object. *Ricketson v. Milwaukee*, 105 Wis. 591, 47 L.R.A. 685, 81 N. W. 864; *Hannan v. Board of Education*, 25 Okla. 372, 30 L.R.A.(N.S.) 222, 107 Pac. 646; *State ex rel. McMahon v. McKenzie*, 9 Ohio C. C. N. S. 105, 29 Ohio S. & C. P. Dec. 115.

Commissioners cannot advertise or call for bids upon various different articles or varieties, and then award contract to lowest bidder on one article or variety.

This does not afford competitive bidding, and a contract so let or made is void. *Stocking v. Warren Bros.* 134 Wis. 235, 114 N. W. 789; *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989; *Coggeshall v. Des Moines*, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; *People ex rel. Ream Pav. Co. v. Board of Improvement*, 43 N. Y. 227.

No estimate of the probable cost of constructing the courthouse was ever made, and the people and taxpayers have no accurate knowledge of the amount that may be expended by the defendants. *Dill. Mun. Corp.* 5th ed. § 807, pp. 1213-1215; *Diamond v. Mankato*, 89 Minn. 48, 61 L.R.A. 448, 93 N. W. 911.

The boards or officers who award such contracts cannot exercise the discretion intrusted, in an arbitrary manner, and without reason reject the lowest bid and accept a higher bid. 2 *Dill. Mun. Corp.* § 811. p. 1223; *Times Pub. Co. v. Everett*, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4.

The contract in such case should protect the public. *Stansbury v. White*, 121 Cal. 433, 53 Pac. 940; 2 *Dill. Mun. Corp.* p. 1213, note.

Wood v. Bangs, 1 Dak. 179, 46 N. W. 586, decided by the territorial supreme court in South Dakota in 1875, is not an authority upon the questions involved in this case. If such decision is correct, the plaintiffs would be without remedy, since they were not a party to any proceedings before the county commissioners. *Pierre Waterworks Co. v. Hughes County*, 5 Dak. 145, 37 N. W. 733; *Dunbar v. Canyon County*, 5 Idaho, 407, 49 Pac. 409.

Chas. E. Wolfe, State's Attorney, and *Wolfe & Schneller*, for respondents.

There is a clear want of equity in the bill, and the appeal should

be dismissed. Questions should not be litigated, and decided merely to show which lawyer is right. *State v. Moody*, 15 N. D. 230, 106 N. W. 1135.

The "courthouse building fund" is, in law, the "county building fund." It is the fund authorized by law to be created, and it is the one created. The commissioners have no power to create any other fund, for a similar purpose. *Kane v. Hughes County*, 12 S. D. 438, 81 N. W. 894; *Golding v. Hughes County*, 13 S. D. 53, 82 N. W. 1119; *Dakota County v. Bartlett*, 67 Neb. 62, 93 N. W. 192.

The plaintiffs are guilty of laches. They had full knowledge of all the facts, but waited until the people of the county were without a courthouse,—until all plans and contracts had been made for the construction of a new courthouse, before making any more. *Baring v. Erdman*, 14 Hazard, Pa. Reg. 129, Fed. Cas. No. 981.

In chancery, objection to the equity of the plaintiff's claim, as stated in the bill, must be taken by demurrer, and not by plea. 6 Enc. Pl. & Pr. 395; *Rhode Island v. Massachusetts*, 14 Pet. 262, 10 L. ed. 447.

Public injury warrants denial of relief asked in this case. Each individual plaintiff has a legal remedy. *Sheldon v. Center School Dist.* 25 Conn. 224; *Hardesty v. Taft*, 23 Md. 512, 87 Am. Dec. 584; *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586; 27 Cent. Dig. Cal. 1445-1450. 1463-1471.

Injunction will never be granted where benefits to one party are of but little importance, while it will operate oppressively and to the great annoyance and injury of the other party. *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586; *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528; *Stein v. Bienville Water Supply Co.* 32 Fed. 876; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

FRISK, J. As disclosed by the complaint, the object of this action is to enjoin the carrying out of a contract for the erection of a new courthouse at Wahpeton, made by the board of county commissioners of Richland county with the defendants Ingemann & Company. The plaintiffs are residents and taxpayers of said county, and as such they assert the right to maintain such suit in behalf of themselves and all other residents and taxpayers of the county who may elect to join with them in the prosecution thereof. That they have such right there is

no doubt. *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. 292; *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161.

In *Engstad v. Dinnie* it was, among other things, said: "The right of a taxpayer to institute an action to enjoin municipal officers from unlawfully dissipating public funds is a right common to all taxpayers, great and small, and mere private interests are not necessarily involved in suits of this character." See also note to *Pierce v. Hagans*, 15 Ann. Cas. 1173, 1174, and authorities therein cited. We are clear, therefore, that the second ground of the demurrer is untenable.

The only other ground of demurrer is that the complaint fails to state facts sufficient to constitute a cause of action, and this raises a question of more serious import. Do the facts alleged show on their face that plaintiffs are entitled to equitable relief by injunction or otherwise? Certain preliminary observations may here properly be noticed, which are that nowhere in the complaint is actual fraud or corrupt action on the part of any of the defendants charged or claimed, but it is the alleged lack of authority to do the various acts complained of that constitutes the plaintiff's grounds for equitable relief. It is asserted, the correctness of which assertion we think must be conceded, that the construction of the proposed new courthouse involves an extraordinary expenditure of public funds, necessitating a prior favorable vote of the electors of the county, unless, perhaps, as contended by respondents, that there are sufficient available funds, including the tax levy for the current year, to defray the costs thereof. Section 2419, Rev. Codes 1905, grants power to the county commissioners "to provide for the erection and repairing of courthouses," but provides also that "no expenditure for the purpose herein named greater than can be paid out of the annual revenue of the county for the current year shall be made unless the question of such expenditure shall have first been submitted to a vote of the qualified electors of such county, and shall have been approved by a majority of the votes so cast," etc. Our attention is also called by appellants to the provisions of chapter 67, Laws of 1909, which amends certain enumerated sections of the Revised Codes of 1905 relative to the powers of the board in the matter of extraordinary expenditures of public moneys. Among other things, said statute requires that a proposition for the establishing of a building fund

shall be first submitted to a vote of the electors, etc. It is strenuously insisted by appellants that the complaint, when fairly construed, not only shows that sufficient funds were not on hand to carry out such proposed enterprise, but also that the alleged contract entered into for the construction of said courthouse is in contravention of law in several particulars, among other things, that the contract was not let by competitive bidding, nor was any provision made for the collection of an annual tax to pay the interest and principal when due of the indebtedness necessarily created thereby. Furthermore, that the proposition for such improvements was not submitted to a vote of the electors as required. On the contrary, it is just as strenuously insisted by respondents that such complaint discloses on its face that ample funds for erecting such building were on hand, and that the contract is in all respects legal. They also contend that in any event the facts pleaded, on their face, affirmatively show that appellants are not entitled to the injunctive relief prayed for and that the demurrer was therefore correctly sustained.

We are not here concerned with the question of the broad equities or on an application for a temporary injunction, of the case as they may be developed by a trial, but we are merely to determine whether on its face the complaint fairly presents a case calling for equitable cognizance. In other words, do the facts pleaded disclose a want of equity on the part of those taxpayers? Manifestly they are entitled to the relief prayed for, unless it can be said, under the facts alleged, that respondents are proceeding in a legal manner, or that appellants, by lapse of time, have lost their rights to equitable relief by reason of the greater resulting equities in favor of the public.

After mature deliberation we have reached the conclusion that it was error to sustain the demurrer, and our reasons for this conclusion will be briefly stated. We agree fully with appellants' contention that the complaint, when fairly and liberally construed, as it must be, discloses that the board, in letting the contract, failed to proceed according to law. The proposition called for an extraordinary expenditure of public moneys, and should have been submitted to a vote of the people. Sufficient funds were not on hand, nor was any provision made, as required by law, for raising the necessary funds required for the carrying

out of such improvement. Even conceding the correctness of respondent's contention that appellants cannot question the legality of the method whereby the \$84,614 building fund was created, we cannot ignore the fact, as alleged, that a large amount thereof was wrongfully diverted from other funds and therefore presumably will have to be restored to the proper fund. Furthermore, it appears that even if such fund *in toto* is available, together with the current levy of taxes for 1911, it is evidently inadequate to complete such courthouse, it appearing from such complaint that the contract, as entered into, does not provide for furnishing such building with the necessary heating and ventilating apparatus, nor with electric wiring, gas fitting, plumbing, vault doors, vault window shutters, counters, bar railings, and furniture. But, aside from these considerations, we are agreed that under the facts alleged, the contract is void because not authorized by the voters of the county. This being true, the complaint states a cause of action, unless, as before stated, it appears therefrom that by lapse of time plaintiffs have lost their right to equitable relief. We are clear that no such situation is presented. While it appears that the work of erecting such courthouse was commenced prior to the institution of this suit, it does not appear how far such work had progressed; nor can it be inferred that such contract has at this time been substantially completed, as the same was not entered into until February 27th last, and by its terms the contractors are given until next August in which to complete their contract. Nor does it appear what portion, if any, of the contract price has been paid by the county. The rule invoked by respondent's counsel, that the equities of the public far outweigh those in favor of these taxpayers, and that irreparable injury will inevitably result from the issuance of an injunction as prayed for, can therefore have no application to the questions here presented. Upon a trial of the cause on its merits it may develop that such rule can and should be successfully invoked.

Order reversed, and the cause is remanded for further proceedings.

24 N. D.—25.

**WILLARD v. MOHN, Administrator of the Estate of Alfred Thorson,
Deceased.**

(139 N. W. 981.)

**Appeal from justice court — dismissal — insufficient undertaking — proofs of
— District court.**

1. The litigant who moves to dismiss an appeal from the justice to the district court upon the grounds that the copy of the undertaking served upon him was incomplete must make formal proof of such fact by affidavit or other proof, and present such proofs to the trial court. In the case at bar, no such proof was made at the time the trial court denied the motion to dismiss, but some four months later affidavits were filed in the district court tending to prove such facts. *Held*, that this court will not consider such affidavits, but will review the action of the district court upon the proofs that were already before it.

Motion to dismiss appeal — notice of hearing on merits — demurrer — practice.

2. The respondent at the time of the hearing, upon the motion to dismiss, also served notice "that defendants should take notice that the merits of the law applicable to the specifications of error as enumerated in the notice of appeal may be considered." *Held*, that this was a notice that the merits of the demurrer interposed in the justice court would be considered, if the motion to dismiss the appeal were overruled, and the trial court rightfully tried the issue of law arising upon said demurrer.

Tort — action for — tortfeasor — death of terminates action — issue.

3. At common law the action for tort died with the tortfeasor, and this rule has not been changed by statute in this state. Demurrer interposed in justice court squarely raised this issue, and the trial court correctly sustained the same without leave to amend.

Opinion filed January 22, 1913.

Appeal from the District Court for Williams County; *Goss, J.*
Affirmed.

William Maloney, of Wheelock, for appellant.
Van R. Brown, of Ray, for respondent.

BURKE, J., This action is closely related to the case of *Willard v. Mohn*, post, 390, 139 N. W. 979, the only difference being that the other

action was for the killing of Erma Willard, and was brought by her infant son; the case at bar is brought in justice court by David and Luella Willard, father and mother of Erma Willard, and is for damages to building and furniture and loss of time, upon the occasion of the said killing. The complaint reads as follows: "That on or about, to wit, May 13, 1907, Alfred Thorson, now deceased, of whose estate B. L. Mohn is administrator, went to the house of David Willard, the plaintiff herein, and did unlawfully, and against the will of these plaintiffs, and without their permission, break and destroy and injure the building situated thereon . . . and the furniture therein contained, and thereby caused loss to the plaintiff herein, by such breakage, and loss of time, and expense and repair in the amount of \$200." To this complaint the defendant demurred on the ground that the said complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and after trial in justice court, judgment was rendered in favor of the plaintiffs. The appeal was taken from such judgment to the district court of Williams county. While such appeal was pending, the plaintiffs appeared before the said district court and made the following motion: "Plaintiffs appearing especially by their record attorney except to the jurisdiction of the court, and move the court to dismiss the appeal attempted herein, for the reason that the notice of appeal and undertaking on appeal, or either of them, was not filed in the office of the clerk of the district court within the statutory time for filing." This motion was denied. Thereafter, another motion was made by plaintiffs to dismiss said appeal, upon the ground "that said action is irregular upon the calendar, and that the law permitting said action to be tried in the district court has not been complied with, and on account of such irregularities said case should be stricken from the calendar. That the notice of appeal is insufficient to confer jurisdiction upon the district court. That the district court has no jurisdiction of the subject-matters of the appeal, for the reason that no sufficient pleading of defendant has ever been served upon plaintiffs herein. And you are hereby further notified that the merits of the law applicable to the specifications of error as enumerated in the notice of appeal may be considered." This motion was argued April 16, 1909, and was denied by the trial court. At said time the attorney for the plaintiff urged as a

ground for a dismissal of the attempted appeal, and represented to the court to be a fact, that the copy of the undertaking served upon the plaintiff did not have the names of the sureties mentioned in the body of said undertaking, and did not contain any affidavit of the qualifications of said sureties. At said time and place, said attorney for plaintiff produced what purported to be a copy of the undertaking on appeal, and offered same in evidence. However, there was no proof otherwise than the mere statement of the attorney that the copy was the one that had been actually served upon the plaintiffs, and it appeared from the files in the case that the original undertaking on file in the office of the clerk was duly signed and verified by the sureties, as required by law, and contained an admission of service by plaintiff's attorney.

(1) The first question arising for our consideration concerns the correctness of the ruling of the district court in denying the motions of plaintiff to dismiss the appeal. As appears from our statement of facts, no proof was offered to the trial court of any irregularities in the appeal. In fact, the original undertaking which was on file and open to the inspection of the trial court appeared in all things regular. Under those circumstances the trial court had no option but to deny the motions. The litigant presenting a motion to dismiss an appeal must prove, by affidavit or from the face of the records, the irregularities of which he complains. There appears in the files an affidavit of the attorney for plaintiff dated the 10th day of August, 1909, in which an attempt has been made to supply these necessary allegations, and at said date there was also filed a certificate of the clerk of the court of Williams county. However, as those affidavits and certificates were dated and filed some four months after the ruling of the trial court had been made, they could not have been presented to the trial court, and cannot now be considered by this court. We conclude, therefore, that the ruling of the trial court in this particular was correct.

(2) The plaintiffs complain, next, of the ruling of the district court, wherein the demurrer interposed in the justice court was sustained by the district court and the action dismissed. It is their contention that the trial court should have placed the action for trial upon the calendar upon its merits. We think the plaintiff has changed his attitude upon this question since the hearing of April 16, 1909, because at that time

we notice that they "further notified defendants that the merits of the law applicable to the specifications of error as enumerated in the notice of appeal may be considered." We think that upon such motion the trial court had a right, and it was its duty, to consider the merits of the demurrer, and treat the same as a trial upon that issue.

(3) This brings us to a consideration of the correctness of the order of the trial court sustaining the demurrer without leave to amend the complaint. It will be noticed that the cause of action is in tort. At common law the action for tort dies with the death of the tort feisor, and such is still the law in this state.

Section 8161, Rev. Codes 1905, prohibits action for money only against such administrator, excepting as provided in said chapter 6,— and actions in tort are not among the enumerated exceptions. See also Addison, Torts, chap. 20; 1 Cyc. 51, and cases cited. The complaint shows that the action is in tort. The goods were destroyed and did not go to enrich the estate of the tort feisor. The claim, therefore, of plaintiffs that they should have been allowed to amend their complaint to show an implied contract on the tort feisor's part, to pay for the goods destroyed, is without merit. So long as the facts above mentioned are pleaded, the action remains in tort, and comes under the prohibition of the statute. If the amended complaint stated other facts so as to be founded upon contract, it would be such an amendment as would change the cause of action, and would be prohibited as such. Under those circumstances it was the duty of the trial court to end further litigation by dismissing the action.

The other errors assigned have either been waived by the appellants or are governed by the foregoing reasons.

The judgment of the District Court is in all things affirmed.

Goss, J., being disqualified, did not participate in this opinion.

WILLARD, Guardian *ad litem* for Alva Vernon Willard, an Infant,
v. MOHN, Administrator of the Estate of Alfred Thorson, De-
ceased.

(139 N. W. 979.)

**Infant — guardian action — infant by guardian ad litem — demurrer — plead-
ings — amendments — real party.**

1. An action brought under chapter 38, Revised Codes 1905, in favor of an infant, the death of whose mother has been caused by the wrongful act of the defendant, should be brought in the name of the infant by its guardian *ad litem*, and not in the name of the guardian himself. An action so entitled does not state a cause of action in favor of the guardian, and the objection is properly raised by demurrer. The defendant is entitled to have the action brought in the name of the infant in order that an adverse judgment may be pleaded as *res judicata* in any subsequent proceedings. However, where, as in the case at bar, the complaint does show that the action was being brought for the benefit of the infant, and that the entitling of the action resulted from an error of the pleader, the trial court should allow an amendment of the pleadings so as to show that the infant was the real plaintiff. See *Perine v. Grand Lodge*, A. O. U. W. 48 Minn. 82, 50 N. W. 1022.

**Statutes — common law — right of action — tort — claim against estate — tort
feasor.**

2. Chapter 38, Rev. Codes 1905, commonly known as the Lord Campbell's act, is in derogation of the common law, and one who seeks to recover thereunder must point to a plain provision of the statute authorizing his cause of action. Section 7690, Rev. Codes 1905, providing that the action shall not abate upon the death of either party to the action, does not authorize the bringing of an action of wrongful death after the death of the tort feasor. In the case at bar the complaint does not show whether the tort feasor or his victim died first. If the legislature desires to make the action for wrongful death a claim against the estate of the deceased tort feasor, it must do so in plain language.

Opinion filed January 22, 1913.

Note.—The authorities on the question of the survival of action for wrongful death upon decease of wrongdoer are collated in a note in 11 L.R.A.(N.S.) 1157, where it is shown that the common-law rule, that a cause of action for a purely personal tort died with the death of either party to the action, applies to actions for wrongful death brought after the death of the tort feasor, except where the rule has been modified by statute.

Appeal from District Court for Williams County; *Goss, J.*

Affirmed.

William Maloney, for appellant.

This action, in tort, survives the death of the tortfeasor. Rev. Codes, Sec. 6789; 13 Current Law, 1245, note 25; *Devine v. Healy*, 241 Ill. 34, 89 N. E. 251; 21 Enc. Pl. & Pr. 346, note 3.

Van R. Brown, for respondent.

Action must be brought in name of real party in interest. Rev. Codes, § 6407.

Infant must sue in his own name by his guardian *ad litem*. *Price v. Phoenix Mut. L. Ins. Co.* 17 Minn. 497, Gil. 473; *Perine v. Grand Lodge, A. O. U. W.* 48 Minn. 82, 50 N. W. 1022; *Peterson v. Baillif*, 52 Minn. 386, 54 N. W. 185.

Action against administrator for personal tort of deceased could not be maintained at common law. Addison, Torts, chap. XX, Sec. 1315; *Green v. Thompson*, 26 Minn. 500, 5 N. W. 376; *Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 146; *State ex rel. Kelly v. McMaster*, 13 N. D. 58, 99 N. W. 58.

Such an action is prohibited by our statute. Secs. 8160–8164.

BURKE, J. This is an action brought to recover damages for wrongful death under chapter 38, Revised Codes 1905, commonly known as Lord Campbell's act. The action is entitled "David Willard, Guardian *ad Litem* for Alva Vernon Willard, an Infant, Plaintiff, vs B. L. Mohn, Administrator of the Estate of Alfred Thorson, Deceased," and in substance alleges that David Willard, plaintiff herein, as guardian *ad litem*, is the duly appointed guardian *ad litem* of and for Alva Vernon Willard, who is an infant of the age of one year. That B. L. Mohn, the nominal defendant, is the duly appointed and acting administrator of the estate of Alfred Thorson. That said Alfred Thorson died on May 13, 1907; that Alva Vernon Willard, the party plaintiff for whose benefit this action is brought, is the only child born of Erma Willard, the party for whose wrongful death this action is brought. That on May 13, 1907, Alfred Thorson unlawfully, wilfully, and maliciously shot, beat, and killed one Erma Willard, the mother of Alva Vernon Willard, the party plaintiff for whose benefit this action is brought. That said killing was done in Williams county, North Dakota. That at the time

of her death said Erma Willard was between eighteen and nineteen years of age, in good health and spirits, and unmarried, and that the said Alva Vernon Willard has suffered damages in the premises in the sum of \$5,000.

To this complaint a demurrer was interposed upon three grounds. First, that there is a mistake of parties plaintiff; second, that there is a mistake of parties defendant; and, third, that the complaint did not state a cause of action. The demurrer was sustained by the trial court upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and that the defect was incurable; and judgment was ordered upon the pleadings for a dismissal of the action without the privilege of amending said complaint.

It will be noticed that the complaint alleges that both Alfred Thorson and Erma Willard died on the 13th day of May, 1907, but is silent as to which death occurred first.

Chapter 38, being §§ 7686-7691, both inclusive, Rev. Codes 1905, has been set forth in full in the opinion of *Satterberg v. Minneapolis, St. P. & S. Ste. M. R. Co.* 19 N. D. 38, 121 N. W. 70, and we will not incorporate it in this opinion, excepting to call attention particularly to § 7690, which reads as follows: "The action shall not abate by the death of either party to the record. If the plaintiff dies pending the action, the person next in order, entitled to bring the action, shall by order of the court be made plaintiff therein."

(1) The first question arising upon the record is whether or not the plaintiff has stated a cause of action in his favor. It is pointed out that the title of the action is "David Willard, Guardian *ad litem* for Alva Vernon Willard, Plaintiff," and it is insisted that chapter 38, Rev. Codes 1905, does not authorize an action in favor of the said David Willard, who was the father of the deceased, but that such cause of action, if any exists, is in favor of the infant son of the deceased. This is undoubtedly true, and would justify the sustaining of the demurrer. See *Harshman v. Northern P. R. Co.* 14 N. D. 69, 103 N. W. 412. The defendant is clearly entitled to have the action brought in the name of the infant, in order that said infant may be estopped by an adverse decision from bringing another action. The title to this action should be "Alva Vernon Willard, by David Willard, His Guardian Ad Litem." However, in this action it appears from the body of the complaint that

the intention was to bring the action in the name of the infant, and that the defect in the title is due to an incorrect use of language by the pleader. For example, in one paragraph of the complaint the following language is used: "Alva Vernon Willard, party plaintiff for whose benefit this action is brought." It thus appears that the pleader intended the action to be brought on behalf of the infant; and we think, under all the circumstances of the case, in order to do justice to the litigants, that an amendment should have been allowed when the error was pointed out. See *Perine v. Grand Lodge, A. O. U. W.* 40 Minn. 82, 50 N. W. 1022.

(2) The vital question remaining then is whether or not under said chapter 38, Rev. Codes 1905, the cause of action survived the death of Alfred Thorson. As stated in the case of *Satterberg v. Minneapolis, St. P. & S. Ste. M. R. Co.*, the several states have, in adopting Lord Campbell's act, made such material changes in the language that decisions from other states are of little value in the construction of our statute. Several broad principles of law, however, seem to have received the sanction of all the courts. At common law any cause of action in tort died with the death of either party. The original Lord Campbell's act (9 & 10 Vict. chap. 93) gave to certain enumerated surviving heirs a cause of action against the tortfeasor, but made no provision for continuing such cause of action against his personal representatives after his death. The several American states in enacting this legislation seem to have adopted a similar course, and under the holdings of these courts the cause of action given by the said act died with the tortfeasor. In reaching this conclusion they have given as reasons that "statutes in derogation of the common law are to be strictly construed; and one who seeks to maintain an action which was within the prohibition of the common law must be able to point to a statute which, in plain and explicit terms, authorizes the action to be maintained." Those various cases are enumerated and explained in the case of *Bates v. Sylvester*, 205 Mo. 493, 11 L.R.A.(N.S.) 1157, 120 Am. St. Rep. 761, 104 S. W. 73, 12 Ann. Cas. 457. It will be found from an examination of such authorities that, with one or two exceptions, and those in states having statutes of great explicitness authorizing the action, the cause of action does not survive. The rule is stated in 13 Cyc. 328, as follows: "The better rule seems to be that where a statute gives

a right of action for death by wrongful act, such action abates upon the death of defendant therein. In several cases, however, it has been held that an action for death by wrongful act survives against the personal representatives of defendant when he dies pending the action." An examination of the cases cited as supporting the minority rule shows statutes unlike ours in that they provide in positive terms that the cause of action shall survive the death of the defendant, and making provision for payment from the estate of the deceased tortfeasor. This brings us down to the consideration of our own statute, and particularly § 7690, which states that the action shall not abate by the death of either party to the record. This language might, upon a superficial reading, be taken to mean that the *cause of action* might survive against the personal representatives of the deceased tortfeasor or against his estate, but upon more careful consideration this will be found untenable. In the first place the statute provides only that "*the action* shall not abate." In this case no action has been commenced. If the legislature had meant cause of action as well as action, they should have so stated. Again, no provision is made in our statute for the presentation of a claim against the estate, nor provision made for its allowance or rejection, nor any provision made for the payment of any amount recoverable. Indeed, §§ 8160-8161, Rev. Codes 1905, seems to prohibit any such recovery, § 8161 reading: "No action for the recovery of money only shall be brought in any of the courts in this state against any executor, administrator, or guardian, upon any claim or demand which may be presented to the county court, except as provided in this chapter." And the chapter contains no provision whatever for claims such as the one presented by the plaintiff herein. In this case, as we have already noticed, the complaint does not show whether the tortfeasor Thorson, or his victim, died first. If Thorson died first, there was no cause of action for wrongful death to survive him, because his victim was still living at the time of his death.

In view of the well-settled rule that actions in derogation of common law must be amply authorized by statute, we are obliged to hold that the language of § 7690 does not clearly authorize the plaintiff's suit herein. If the legislature desires the cause of action to become a claim against the estate of the deceased tortfeasor, they can readily enact legislation so providing.

The decision of the trial court sustaining the demurrer without leave to amend, was correct, and is accordingly affirmed.

Goss, J., being disqualified, did not participate in this opinion.

McCARTHY v. TALLEY.

(139 N. W. 1012.)

Opinion filed January 29, 1913.

Buttz & Sinness, of Minnewaukan, for plaintiff and respondent.

P. J. McClory, of Devils Lake, and *Stuart & Comstock*, of Minnewaukan, for defendant and appellant.

PER CURIAM. The same issues are involved in this action as were disposed of in the companion case of *McCarty v. Kepreta*, — L.R.A. (N.S.) —, 139 N. W. 992, in which an opinion has recently been filed granting a new trial to John Kepreta, appellant. That decision controls the disposition of this case. Accordingly, it is ordered that the judgment herein entered, and the order therefore, be set aside and vacated and a new trial in this action is granted. The costs of this appeal are to be assessed in favor of appellant and against respondent, but excluding those on the reargument had on the rehearing granted.

SPALDING, Ch. J., and BRUCE, J., dissent. For reasons stated in dissenting opinion in the case of *McCarty v. Kepreta*, filed this day, we dissent from the foregoing opinion of the court.

McCARTY v. KEPRETA.

(— L.R.A.(N.S.) —, 139 N. W. 992.)

This action for replevin is brought by plaintiff as indorsee of a note secured

Note.—On the question of imputation of knowledge of bank officers to bank, where officers are personally interested, see note in 29 L.R.A.(N.S.) 558.

by chattel mortgage on the replevied property, by which action plaintiff seeks to recover the mortgaged property for foreclosure purposes. The note and mortgage were executed by defendant to a state bank at Knox, and by it were assigned by its cashier for value to its president, this plaintiff. Plaintiff testifies he had no actual knowledge of any infirmity in the note or of any defense to its payment; and that he, though president and a director of the bank, was a nonresident, and not active in its management, and had no personal knowledge concerning the transaction under which the note and mortgage were taken to the bank by the cashier as its managing officer. Plaintiff purchased the note of the bank before maturity, paying therefor full face value. Defendant defends on the ground that he received no consideration whatever for the note from the payee or any other person. From the trial court's rulings, that such defense is not available until actual knowledge of such want of consideration for the note shall have been established as known to this plaintiff, or until such facts were established as would constitute bad faith in the purchase of the instrument by plaintiff, and that proof that plaintiff was at all times in question the president and necessarily a director of the bank was insufficient as a foundation to admit proof of the want of consideration for the note in this action, it is *held*:

Negotiable instruments act — banks — holder in due course.

(1) The negotiable instruments act does not operate to constitute plaintiff a holder in due course of such negotiable note, where from his relationship to the payee, the bank, under the banking laws plaintiff is presumed in law, from such relationship, to have had actual knowledge of the facts under which the note was executed by defendant and obtained by the bank.

Holder in due course — payee — indorsee — negotiable instruments.

(2) In determining whether plaintiff is a holder in due course of such negotiable instrument, as a holder in due course is defined under the negotiable instruments act, § 6354, Rev. Codes 1905, the relationship of the indorsee to the payee and the law thereto applying must be considered with, and as supplementing, the negotiable instruments act; and §§ 6354, 6357, and 6358, defining a holder in due course, defective title to the instrument, and notice of infirmity in the instrument or notice of defect of title thereto, cannot be construed as excluding the general law governing the relationship of the bank and its president, so as to constitute the president of a state bank, and necessarily by law a director thereof, a holder in due course of a negotiable instrument, against the payment of which the maker in a suit by the bank would have a defense.

Defense — want of consideration — notice — good faith.

(3) A defense of want of consideration available to a maker as against a state bank as payee of a negotiable instrument may be asserted as a defense in an action brought by the bank president against the maker, without proof of actual notice had by such president of the fact that the note was given

without consideration; and this without regard to the good faith of the bank president in his purchase of the negotiable instrument sued upon.

Bank — cashier's knowledge of infirmity in note — knowledge of directors — bank president.

(4) The cashier's actual knowledge of the infirmity in the instrument, of it being without consideration, the law conclusively presumes to have been communicated in due course to, and to have been had by, the board of directors under the circumstances of this case wherein no interest hostile to the bank or in fraud of its stockholders or depositors is asserted; and such presumed actual knowledge in its directors is presumed to have been had by plaintiff as president of the bank at the time he purchased the negotiable instrument of the bank acting by its cashier.

Presumption of law.

(5) Whatever knowledge plaintiff as a director and officer of the bank at such time had, or ought to have possessed as an official, he will be conclusively presumed in law to have had as a private individual.

Negotiable instrument — holder in due course — defense.

(6) Such presumption renders impossible plaintiff's recovery as a holder in due course of the negotiable instrument in suit if the defense offered is established.

Proof of neglect — banks — president — stockholders.

(7) Proof of neglect of duty owing by the president to the bank, its stockholders, and depositors, and persons dealing therewith, by proof of failure of the president and director to participate in the active management of the bank, and the consequent ignorance of the facts of the transaction in question, does not relieve such official from the knowledge presumed in him, and is immaterial on the question of his good faith in the purchase of the negotiable instrument sued upon.

Claim and delivery — counterclaim — subject-matter of action — verdict.

(8) A defendant in an action of claim and delivery may counterclaim, and, on proof, recover for damages occasioned by the wrongful taking and detention by the plaintiff of the personal property, taken by claim and delivery proceedings pending the action, where the defendant, on the merits, recovers judgment entitling him to such property. In such an action the property replevied is the subject-matter of the action, and damages for such wrongful taking and detention of the subject-matter of the action are "connected with the subject of the action," within the meaning of the first subdivision of § 6860, Rev. Codes 1905, and as also contemplated by § 7036, Rev. Codes 1905, concerning the form of verdict to be returned in claim and delivery proceedings.

Appeal — motion to remand record — judicial admissions — affidavits — procedure — merits.

(9) Pending appeal, and with the record in this court, attorney for appel-

lant, in an endeavor to secure a remand of the record to the district court, that he might there move for a new trial on the grounds of newly discovered evidence tending to substantiate his defense, plead and sought to be interposed on trial, filed in this court in support of the motion to remand the affidavits of defendant, his attorney of record, and that of a third party, the latter containing statements antagonistic and contrary to both the claim of good-faith purchase in due course by plaintiff of the note, and also the defense of the defendant of a want of consideration, and tending to establish a payment by the bank of \$1,500 or \$1,800 to defendant as a consideration for the note, an amount in excess of the value of the property involved in these replevin proceedings, and which if taken as a judicial admission by defendant would destroy his defense of total want of consideration. Upon hearing, the motion, to remand the record was denied. Subsequently the appeal was argued and submitted for decision on the merits. Thereafter this court, on its own motion, without any consideration of the merits involved, summarily dismissed the appeal and affirmed the judgment appealed from, on the grounds that the affidavit of such third party constituted plaintiff's judicial admission of want of merit in his defense, and established the matters submitted on the appeal to be sham and frivolous. On a rehearing then granted, at which full reargument was had, it is held:

(a) That this affidavit, taken with all the affidavits filed for such purpose, should not be held to constitute the judicial admission of the defendant of an absence of merit in his appeal.

(b) In determining the effect to be given to an affidavit so filed by a party, its contents should be taken in connection with the other affidavits and the nature of the proceedings and purposes for which the same was filed; and when filed as here, after judgment and pending an appeal, to work a dismissal of the appeal, there should be no doubt of the intent of the party filing the same to adopt the statements therein made as his own for all purposes of the case; and the statements thus adopted must not be susceptible of an explanation consistent with good faith in the appellant.

(c) In case of a substantial doubt as to whether such an affidavit should be construed as a judicial admission of want of merit, where an explanation as to the circumstances of its filing warranted the exercise of discretion by the court, such affidavit should be held not to amount to such a judicial admission, as the holding of the court should be toward relieving a party from the inadvertent or unintentional admissions of counsel where the same, if applied, become a judicial admission, and, as a matter of procedure regardless of merit, abrogate the appeal.

(d) With the explanation made of the circumstances under which the affidavit in question was obtained for the purposes for which it was filed, it having been ruled upon and superseded by subsequent proceedings had in the case, this court will disregard such affidavit and decide the cause upon the merits.

Opinion filed January 29, 1913.

An appeal from the District Court for Benson County; *Cowan, J.* From a judgment for plaintiff, defendant appeals.

Reversed and new trial ordered.

P. J. McClory and Stuart & Comstock, for appellant.

Counterclaim for damages for wrongful taking and detention of property in claim and delivery action, proper, as arising out of or connected with the subject of the action. Rev. Codes, Sec. 6860, Subdiv. 1; Cobbey, Replevin, 1st ed. secs. 783, also 795; Vallancey v. Hunt, 20 N. D. 579, 34 L.R.A.(N.S.) 473, 129 N. W. 455.

When it is shown that the title of a person who has negotiated the note is defective, the burden is on the holder to prove that he or some other person under whom he claims had title as a holder in due course. Rev. Codes 1905, Sec. 6361; Union Nat. Bank v. Mailloux, 27 S. D. 543, 132 N. W. 168; Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; Arnd v. Aylesworth, 145 Iowa, 185, 29 L.R.A.(N.S.) 638, 123 N. W. 1000.

In an action by an alleged holder in due course on a note shown to have its origin or inception in fraud, the burden is upon the plaintiff to affirmatively establish his good faith in the transaction. Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237.

The knowledge of an agent is the knowledge of the principal. Wade, Notice, § 672; First Nat. Bank v. Erickson, 20 Neb. 580, 31 N. W. 387; Stough v. Ponca Mill Co. 54 Neb. 500, 74 N. W. 868; Third Nat. Bank v. Marine Lumber Co. 44 Minn. 65, 46 N. W. 145; Harvester v. Miller, 72 Mich. 265, 40 N. W. 429; First Nat. Bank v. Shaw, 157 Mich. 192, 133 Am. St. Rep. 342, 121 N. W. 811.

Buttz & Sinness, for respondent.

Counterclaim must arise out of the contract or transactions set out in the complaint. Braithwaite v. Akin, 3 N. D. 374, 56 N. W. 133.

Good faith must be shown in purchaser. Rev. Codes, sec. 6358; First Nat. Bank v. Flath, 10 N. D. 285, 86 N. W. 867; 1 Morse, Banks & Bkg. § 75; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; Fortier v. New Orleans Nat. Bank, 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. Rep. 234.

Good faith does not require plaintiff to make inquiry as to possible defenses. Goodman v. Simonds, 20 How. 343, 15 L. ed. 934; Gray v. Boyle, 55 Wash. 578, 133 Am. St. Rep. 1042, 104 Pac. 828; Craw-

ford, Anno. Neg. Inst. Law, p. 68; Sucker State Drill Co. v. Wirtz, 17 N. D. 316, 18 L.R.A.(N.S.) 134, 115 N. W. 844.

Purchaser of note must have actual knowledge of infirmity, or knowledge of such facts as amount to bad faith. American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99.

Purchaser of note may be required to state that he bought in good faith. Knowlton v. Schultz, 6 N. D. 422, 71 N. W. 550; First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; Walters v. Rock, 18 N. D. 52, 115 N. W. 511; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 101; Stough v. Ponca Mill Co. 54 Neb. 500, 74 N. W. 868.

Goss, J. Plaintiff brings replevin alleging a special property interest by virtue of a chattel mortgage upon personal property. The debt secured by the mortgage is evidenced by a negotiable promissory note dated November 12, 1908, executed and delivered by defendant as maker to the Farmers & Merchants State Bank of Knox, and due October 1, 1909, bearing interest at 12 per cent, and indorsed, sold, and transferred for full value before maturity to plaintiff.

Defendant for answer admits the execution and delivery of the note by defendant to the bank, "but alleges that the same was given without any consideration whatever being paid him therefor by the said bank, and that the same is wholly void." That he received no consideration from anyone for the said note, and that no consideration whatever passed therefor from the bank. And as an affirmative defense, "defendant denies that the plaintiff was an innocent purchaser of the said mortgage in due course of business or at all, and alleges the fact to be that plaintiff took the said note, knowing that the same was given without any consideration to said bank, and was wholly void. That plaintiff is an officer of said bank, to wit, president, and had knowledge of the fact that there was no consideration given for the same, and that as such officer of such bank he was bound to know the facts in regard to the execution of said note, and that plaintiff took the said note with knowledge of the defenses thereto."

"For a further and affirmative defense to said complaint" the defendant alleged his ownership of the property replevied, its wrongful taking from him by replevin at this suit of plaintiff, and "that in consequence

of said acts of this plaintiff the defendant was deprived of the use of said property for the period of four days to his damage in the sum of \$30." Further, that he was to an expense of \$15 to secure bondsmen to rebond and redeem said replevied property; that he was put to expense, trouble, and work amounting to four days' time in trying to regain possession thereof, which time was of the value of \$15, and that he was compelled to employ attorneys to defend his possession of said property, and regained possession thereof at an expense to him of \$50. The prayer for relief in the replevin action was coupled with a demand for judgment for the aggregate damages above recited in the sum of \$110. The part of the answer alleging and asking for damages was treated as a counterclaim, and a demurrer thereto interposed on the grounds "that the same do not state facts sufficient to constitute a defense or counterclaim," "and that the cause of action pleaded as a counterclaim does not arise out of the transaction, or of the contract, or of the matters set forth in the complaint, nor is the same connected with the subject of the action." The trial court sustained the demurrer, and error is assigned on this appeal.

On the trial of the main action, plaintiff testified to being a resident of Minneapolis, carrying on the business of real estate and loans; that he purchased the note in question from the cashier, and that "it was indorsed to me the day I bought it, and transferred and delivered to me that day. Paid \$2,000 and accrued interest to the date I bought it for the note. Did not know the note had been dishonored, if it had been. I bought it in good faith. Did not know there was anything wrong with it in any way. I never saw it till the day I bought it. I was in the bank when I bought it. I was not acquainted with Kepreta, the maker. I bought some other notes at the same time, one or two I believe. I mean when I say that I bought that note in good faith that I bought it just the same as I bought every other note that I ever bought in my life, and that everything was straight about it, the note and mortgage, and I went entirely by that and the recommendation of the cashier that the paper and security was good, and that it was a first mortgage. That was the extent of the information I got when I say I purchased it in good faith. I kept the note in my possession until I sent it out for collection in September, 1909. At the time I bought this paper from the bank I had no knowledge or notice of any kind of

any infirmity in the instrument, the note, or of any defect of the title of the bank to the note. I made no inquiries whatever that I know of in regard to the consideration for this note. Minckler (cashier) handed me the note and wanted me to buy it, showed me the security, and told me it was a first mortgage, and told me the man was good, and I bought it on those grounds, that is all I know; had no other transaction in regard to this." Such is the testimony of the plaintiff, upon which recovery was had by an instructed verdict on the theory that the plaintiff was a holder in due course.

In line with the answer, the defendant called plaintiff for cross-examination under the statute, and he testified that he was president of the bank in question; that the bank had been organized three years, and that he was and had been president of it at all times since its organization; that one Tuff and one Minckler were the other officers of the bank; that Minckler was cashier at the time Keprata gave the bank this note; that he did not make any examination of the records of the bank with reference to the consideration for which the note was given. The defendant in his own behalf was called and asked the question: "State what transaction or what conversation you had with Minckler as cashier of the Farmers & Merchants State Bank of Knox at the time this note was given, and what it was given for." Counsel for plaintiff then interposed the objection that the answer sought was "incompetent, irrelevant, and immaterial, no longer an issue in this case; the evidence itself, both for the defendant and plaintiff, now showing the note to have been taken in good faith, and without any notice of any infirmity therein, or any defect in the title of the bank thereto, or any lack of consideration; and it appearing legal upon its face, and that McCarty became the holder of it before it was overdue and without any notice that it had been dishonored, if it had been, and defendant is conclusively estopped from showing anything further." Before ruling upon the objection on inquiry from the court, defendant's counsel stated, with reference to this offer of proof, that the defendant had finished his evidence with reference to showing that McCarty did not purchase this note in good faith and in due course; and that the evidence offered would be with "reference to failure of consideration or lack of consideration for the note," and that otherwise the case so far as the defense was concerned was complete. The court then ruled

upon the objection, and stated that he would allow any further evidence tending to show that "McCarty had knowledge of such facts relative to this note, that his action in taking the instrument amounted to bad faith, and then after having made a sufficient showing on that to satisfy the court that the showing of failure of consideration for the note would be available to the defendant as a defense, then I will allow the evidence as to failure of consideration; but I do not believe that time has arrived in this case when the defense of failure of consideration would be available to you." Counsel for the defendant then made an offer of proof "that at the time this note was given it was given without consideration." Which offer was excluded on the ground that the evidence "shows conclusively that McCarty took the note under such conditions that he is a bona fide holder, and that it is not subject to any defense in his hands." An offer to show the amount of the capital stock of the bank, and that the note evidenced a loan in excess of 15 per cent thereof, and therefore was a loan taken by the bank, contrary to or in disregard of the provisions of the banking law, on the grounds that such excess loan "would be an element to put plaintiff on inquiry, or a circumstance admissible, he being the president of the bank at the time," was excluded on the ground that "it was not a defense to payment of the note, and that the state and its banking department were the only persons who could object to the bank exceeding its lawful limit of loan to any one person." Further offers of proof along the same lines were excluded on similar ground. Error was saved and is assigned as to these adverse rulings, defendant appealing from the judgment entered on the instructed verdict.

The main case resolves into the determination of a single proposition of law. Plaintiff, while president of a state bank, and by virtue thereof one of the directors of said corporation, bought from his bank this note before its maturity, paying full value for it to the bank, who indorsed it by its cashier to the president as his individual property. Plaintiff knew of no infirmity in the negotiable instrument he thus in good faith purchased. Under the answer and issues joined and the offers of proof on trial thereunder, the maker, the defendant and appellant, received no consideration for the note from the bank or any other person. An offer to prove such want of consideration was on objection excluded on the ground that plaintiff as a holder in due course of such negotiable

paper, indorsed before maturity to him for value, was protected from such defense of want of consideration as between the maker and the payee, the court evidently applying to the case the bar announced by §§ 6357-6359, Rev. Codes 1905. If plaintiff is a holder in due course, as defined by § 6354, Rev. Codes 1905, of the negotiable instruments act of 1899, beyond doubt the trial court was correct. The decisive question, then, is whether plaintiff, by his purchase without actual notice of infirmity of the instrument, but under his relationship to the payee in the note, can be a holder in due course under our negotiable instruments law, § 6354.

A holder in due course is by this section defined to be "a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That, at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." As to the first three of these subdivisions, granting the purchase for value and in good faith, no question arises. It is on the fourth subdivision, as to notice to the bank who negotiated it to him, of the infirmity of the instrument, construed with § 6358, defining notice of infirmity, that the questions for solution arise. Section 6358 defines notice of infirmity in negotiable instruments necessary to defeat recovery and render a purchaser not a holder in due course, by the following provision: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Is it necessary that this director and president of the defrauding institution shall have had "actual knowledge of the infirmity, or knowledge of such facts that his action in taking the instrument amounted to bad faith," or otherwise be held to be a holder in due course, and as such be entitled to recover when the bank could not? Does plaintiff's relationship to the bank, as a director and president of it, charge him with presumed notice of the fraudulent character of the paper he claims to hold as a holder in good faith, so as to defeat such

claim and his recovery; or on the contrary, does § 6358, defining notice of infirmity and therein requiring actual knowledge of the infirmity to defeat recovery, exclude all cases of imputed or presumed notice, and declare the only rule governing in all transactions and under all circumstances, regardless of relationships of the parties, and permit plaintiff to buy, in good faith, fraudulent paper of the bank of which he is president and director, and yet stand in a court in identically the same position, with the same burden of proof resting upon the maker after such facts established as before, and the same in all respects as though an undisputed stranger to the bank, and actual good-faith purchaser for value and holder in due course, had purchased the paper, instead of this plaintiff? This latter is plaintiff's claim on the strength of which he recovered judgment below as a holder in due course on the negotiable instrument in question.

Our negotiable instruments act unquestionably declares the law on all matters covered by it and in all instances wherein it applies. It was enacted as a part of a nation-wide movement to secure uniformity of law concerning negotiable instruments and liabilities arising therefrom. About thirty of the states have an act identical with our negotiable instruments act, codifying the law merchant in such states. But the act necessarily must be construed with statutory provisions or general laws regulating the relationship of the parties. See *Schlesinger v. Lehmaier*, 191 N. Y. 69, 16 L.R.A.(N.S.) 626, 123 Am. St. Rep. 591, 83 N. E. 657, where the sections here under consideration were held to be applied, subject to the state banking law, and to be construed therewith where that applies; also Crawford, *Anno. Neg. Inst. Law*, § 72. And here the law governing notice imputed or presumed as between the payee and the president and director of this bank as indorsee of its paper must be considered with the statute as to negotiable instruments. The statute defines negotiable instruments, and also defines the rights of this holder governed by the negotiable instruments act, unless the law governing relations of bank and bank president prevent plaintiff from being a holder in due course under the act.

Under our law regulating state banking institutions, § 4639, Rev. Codes 1905, the president must be chosen from among the bank directors, who in turn must be stockholders, and as such financially interested in the income and welfare of the institution. The board of directors

under our banking laws constitutes the governing body of the bank, and the president and cashier its active, ostensible managing agents in the conduct of its business. It is in evidence that the cashier as a managing officer of the bank took to it as payee this note. Under the offer of proof rejected, we must assume it was so taken without consideration, and voidable as between the maker and payee. The bank, then, was charged with notice of all defenses and of the invalidity of the note. This is not a case illustrated by holdings similar to *State Sav. Bank v. Montgomery*, 126 Mich. 327, 85 N. W. 879, wherein the bank, as payee, disclaims any want of knowledge of or responsibility for the act of its managing officer in taking this note to it without paying a consideration. Why the note to the bank was obtained by the bank under such circumstances does not appear, and for aught we know it may have been executed to the bank as accommodation paper, which its president and director now assumes to hold as a holder in due course and without notice of infirmity in the instrument, and which doctrine we are asked to approve.

Section 137 of *Morse on Banks & Banking* answers the crucial inquiry involved. After speaking of the subject of imputed notice to the bank of matters brought to the notice of bank directors and bank officials, the authority says: "The converse of the doctrine just discussed is much more simple. Whatever knowledge a director has or ought to have officially, he has or will be conclusively presumed at law to have as a private individual." "Thus, a director is affected with notice of the condition and transactions of the bank, of its legal rights, and of the action of its directoral board on any subject. If the bank is insolvent, or if it offers him for purchase notes which could only be legally sold by authority of a directoral vote, which has never been given, he is affected with knowledge of the insolvency and of the illegality of the notes. He cannot collect upon them from the bank, on the ground of presumed regularity as a bona fide outside purchaser of them without notice and for value could do." "If a director of a bank is surety on a note, or if a director is a partner in a firm which is surety on a note, held by the bank, the surety will be affected with knowledge of the payment or nonpayment of the note without regard to any statement made by the cashier. A director is chargeable with this amount of knowledge of the affairs of the bank, whether in fact he has it or not, and cannot escape

any responsibility which such knowledge properly entails." Citing *Gillet v. Phillips*, 13 N. Y. 114; *Merchants' Bank v. Rudolf*, 5 Neb. 527; *Lyman v. Bank of United States*, 12 How. 225, 13 L. ed. 965; *Tate v. Bates*, 118 N. C. 287, 54 Am. St. Rep. 719, 24 S. E. 482; *Hauser v. Tate*, 85 N. C. 81, 39 Am. Rep. 689; and *Proctor v. Baldwin*, 82 Ind. 370. See also *United Soc. v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; *Curtis v. Leavitt*, 15 N. Y. 9; *Nelson v. Wellington*, 5 Bosw. 178; *Mason v. Jones*, 1 Hayw. & H. 329, Fed. Cas. No. 9,240; *Ward v. Doane*, 77 Mich. 328, 43 N. W. 980; *Bank of Pittsburgh v. Whitehead*, 36 Am. Dec. 186, and note (10 Watts, 397).

Lyman v. Bank of United States cited, is nearly on all fours with the instant case. Lyman and associates organized a state banking corporation (see facts fully stated in 20 Vt. 666, Fed. Cas. No. 924), and purchased a branch institution at Burlington, Vermont, of the Bank of the United States, executing notes therefor and taking over the business of the branch institution. Lyman and one other associate had been directors of the branch bank purchased, which bank, before the purchase, had compromised and agreed to accept one-half face of certain bills receivable. Lyman and associates, on suit for the final instalment note, undertook to counterclaim or compel the allowance to them of that portion of such claims previously discounted, claiming want of actual notice, and that therefore the branch bank had sold for face value claims it had previously compromised and reduced one half. On the trial, in line with the contention of plaintiff in the instant case and here urged, the defendants there, quoting from the opinion, "asked the court to instruct the jury that it was a question of fact for them to find whether the defendants, or either of them, had knowledge of the condition of these debts, or whether at the time of the purchase said debts or either of them had been compromised and discharged; and if they should find that Wyllys Lyman and John Peck, or either of them, had knowledge of the condition of said debts, and that they had been compromised and discharged, or either of them, at the time of the purchase, and that they derived such knowledge while acting in their official capacity as directors or as committee of said branch bank at Burlington, that such knowledge would not affect the other defendants, or defeat or affect the

right of the defendants to have a deduction [made] from the [amount of] plaintiff's claim on account of said debts as aforesaid. . . . The court refused to instruct the jury agreeably to the . . . request of the defendants, and instructed them that it was a question whether the plaintiff sold the debt of Truesdell & Son as it stood upon the books and the same as to the debt of Silas E. Burrows [the compromised claims]; or whether defendants bought these debts with a full knowledge of the circumstances of these debts; that it appeared that, in pursuance of instructions of the parent bank to the branch bank that it was the duty of the branch bank to make semiannual returns showing what debts were good and what bad and what were considered desperate." That returns were made and memoranda entered, showing "this balance due after compromise," and " 'compromised at the New York office.' . . . That it is claimed by defendants that as those debts are put in at the original amount in the list it is a representation that the debts are due; but that the answer to this is that Lyman and Peck were directors at the Burlington branch and are to be presumed to have been cognizant of the condition of these debts; and further instructed the jury that as it appeared that Lyman and Peck knew the fact of the compromise and condition of these debts at the time of the purchase, although the defendants' objections would be well founded if notice to Lyman and Peck was not notice to the other defendants, yet notice to Lyman and Peck was, in law, notice to all the defendants, and their knowledge was to be in law imputed to the other defendants; and inasmuch as the purchasers knew at the time of the purchase that these debts had been compromised the bank was not bound to make any deduction on account of these debts." The refusal of instructions requested, and the giving of those above quoted, were excepted to, and in passing thereon the court says: "But that if these demands, or either of them, had been compromised and closed previously to the sale to the defendants by the board of directors of the branch at Burlington, inasmuch as there was no warranty of the debts, and two of the purchasers were members of the board and of course cognizant of the compromise and settlement, all the defendants, being joint purchasers, were chargeable with knowledge, and therefore there was no ground for an implied fraudulent representation on account of these two items having been inadvertently placed on the suspended list. . . . And upon a review here it is

the opinion of this court that no error was committed in the direction," and the judgment was affirmed. The directors, Lyman and Peck, of the Burlington branch bank, denied actual knowledge of the compromise, and denied imputation of knowledge to them or their associates. Their claims in such respect are identical with those of this plaintiff. That case, therefore, is the same as though this plaintiff had sued the bank as indorser on this note for which it had given no consideration and therein urged the same claims as to want of actual knowledge herein set forth. The bank could defend, notwithstanding plaintiff's claim of purchase in good faith for value without notice, for the reason that knowledge of the infirmity in the instrument and of its worthlessness was imputed to him before and at the time he purchased it. The principle announced in § 137, *Morse on Banks & Banking*, applies, to the effect that "whatever knowledge a director has or ought to have officially he has or will be conclusively presumed in law to have as a private individual." As a private individual he is presumed in law to know what he should know or ought to have known as an official, a bank director and bank president. And hence the impossibility of the claim by this plaintiff to be a holder in due course. To the same effect is 2 *Thomp. Corp. Sec.* 1662, and *Lancaster v. Collins*, 2 *McCrary*, 352, 7 *Fed.* 338.

In the words of *Hauser v. Tate*, 85 N. C. 81, 39 *Am. Rep.* 689, "the president of a bank is chargeable with constructive notice of the management of its affairs by the cashier and other subordinate officers."

In *Gillet v. Phillips*, 13 N. Y. 114, a purchase of a promissory note at a discount by a director from a bank acting through its cashier was held invalid; the court says: "Want of notice is not available as a defense to a vendee who, at the time of the purchase, was a director in the corporation whose property was the subject of the sale. By accepting that office, he assumed a duty to the stockholders and creditors of the bank to inform himself of what would appear by an inspection of the books of the institution of which he was one of the ostensible managers; and he cannot urge a want of notice arising from a neglect of duty, in justification of a transaction in his own case which the law presumes unauthorized and illegal. In this instance the transfer was made by one director in behalf of the corporation to another, and both were chargeable with knowledge that the contract which assumed to divest

the corporation of its assets was a violation of the 8th section [of the state statutes], in consequence of the omission of the board to pass the resolution necessary to give it validity."

And this leads to the inquiry bearing on the question of the legality of the sale of the note by this corporation, acting by its cashier, to its president. Under the offer of proof as between the bank payee and defendant maker, this instrument was without consideration and a fictitious purported asset upon the books under the banking laws and regulations of the banking board of this state. As director and president of the bank, as between it and its president and director, plaintiff was charged with that knowledge; and in the payment of the face of the note, with interest, to the bank, he was but performing a duty devolving upon him as a director, and discharging a liability to the bank as well, arising from the bank having such worthless paper in its assets. Under the facts if defendant's contention be true, as it must be taken to be under the offer of proof, that said note evidenced no valid consideration, that upon the order of the banking board the duty to charge off this claim, and if called upon to do so to make it good, would have devolved upon the bank and its directors and managing officers. And with notice of this contingent liability, conditional though it may have been, the bank president, this plaintiff, was charged. The law governing banking, and defining the liability of directors and managing officers in such institutions, conclusively negatives the claim that such managing officer can be, as between himself and the bank, or between himself and third persons, a holder in due course when his bank was not or could not have been such holder.

Then, again, while the note remained with the bank unnegotiated, no liability other than to cancel it as given without consideration rested upon the bank as concerned its liability to this defendant. Immediately upon its negotiation to this plaintiff, if it be assumed that such negotiation bound the bank and constituted plaintiff as a holder in due course, a new liability for the full face of the note and interest thereupon would be created by the bank to this defendant; it receiving plaintiff's money virtually as a trustee in said amount for the defendant by virtue of its own wrongful act or fraud in negotiating paper for which it had given no consideration. In this connection if fraud is to be imputed to the bank, as under such facts we believe it should be, its

president is certainly charged with notice thereof. And this is equally inconsistent with any theory that such president could be a holder in due course at the very time he is charged with notice that his act of purchase of the instrument so held consummated a fraud. If such would be the result, then the words of Bolles (Bkg. p. 370) apply, that "an officer is liable to his bank in every case of fraud and misapplication of its funds. Whatever form his misapplication may take, his bank can do nothing to whiten or legalize his act. Bank directors have often attempted to do so, but have succeeded only in implicating themselves. A fraud cannot be ratified, its parentage cannot be transferred from the offender to the bank."

Under plaintiff's contention, granting plaintiff a holder in due course, he would recover of this defendant, while as a bank official he might be personally responsible in law to defendant for his own negligence in failing to know that the bank was obtaining accommodation or fraudulent paper of defendant, and indorsing it to its president, that he might recover as a good-faith holder in due course for value. In the one case his negligence in failing to know the facts and prevent the fraud would render plaintiff personally liable, while at the same time he would be in a position to recover as a good-faith purchaser, because of his negligent failure to know the facts on which his liability for negligence arose. If we permit plaintiff as an individual to assert that he does not know what he as a bank official must in law have known, we must approve and declare possible the above inconsistent and ridiculous, but nevertheless logical, result of holding § 6358 applicable, and requiring actual knowledge of infirmity in the instrument necessary to defeat recovery by a bank president purchasing the bank's accommodation paper. For the mere purpose of uniformity in the law concerning negotiable instruments, it was never intended that its provisions requiring actual notice of the infirmity in the instrument should apply to cases such as this, to the modification or exclusion of the rules of law well established and governing the liability of directors and heads of banking corporations to the bank or its creditors.

Evidence was offered tending to show this loan, for whatever consideration given, was carried on the books of the bank for an amount that would have been in excess of 15 per cent of the capital stock of the bank. In other words, the loan was, on its face, an excess loan. With

knowledge of this fact, plaintiff was charged by law, as well as knowledge of the law rendering him as a director and president possibly financially responsible to the institution, its depositors, and creditors, defendant among the latter, until the note was cancelled or its consideration paid. Bolles, Bkg. p. 287. "Surely if they (bank directors) violate it (the law forbidding excess loans), and losses follow, it is proper to hold them responsible for the violation." And where the usury law is violated and usurious interest exacted or contracted for by the bank, knowledge thereof is imputed to its directors, who are liable therefor.

Nor is the notice imputed to plaintiff, concerning this note and the bank's relation to it if excessive, to be considered as constructive notice. Concerning the obtaining of this note, the law imposed upon the cashier the duty to inform the board of directors of the fact of want of consideration therefor. The cashier is the agent of the board and the bank, and the knowledge of the agent is presumed to have been imparted to the principal, and in the words of Bolles (Bkg. p. 392), speaking concerning this principle, the authority says: "Whenever this great rule has been applied, a bank has been regarded as having had actual knowledge of that possessed or acquired by its president or cashier concerning the pledge of its stock, the trust quality, or other peculiarity of stock pledged to the bank, the existence of a mortgage or other lien, the indorsement of notes taken by the bank, and character of the indorser, the nonpayment of an obligation held as owner or collector, the equities between maker and indorser, the residence of an indorser, the existence of usury; of an agreement or modification thereof to which the bank is a party. . . . In many cases the presumption is conclusive; the principal is presumed to be endowed with the agent's knowledge, and is not permitted to prove the contrary. The fact may be otherwise, but the law will not permit him to set aside the presumption with evidence, however overwhelming it may be. This position is based on the soundest reasons. The rule itself which has served a great purpose might thereby be entirely destroyed. Its application to a particular case may work harshly, but if the principal did not know, the law says he ought to have known; that he alone was to blame either directly or indirectly if he did not. And therefore he, rather than the public, must suffer, as it certainly would by the destruction of the rule." The presumption that the bank president and director received the knowl-

edge possessed by the cashier as to want of consideration for the note in question is, we believe, a conclusive presumption of actual knowledge thereof presumed to have been imparted, estopping the president from claiming to be a holder in due course to the same extent as it would have operated upon the cashier individually, who, under the evidence, negotiated this loan. With actual knowledge conclusively presumed, the case is taken without the statutes defining a holder in due course, and the companion section as to actual knowledge.

In this connection there is evidence that the plaintiff, while holding the office of president, and necessarily a director of this banking institution, had left its management entirely to others, and principally to the cashier. That plaintiff was a resident of Minneapolis, and gave little attention to the business transacted by the bank. This is offered presumably in explanation of why he did not have actual knowledge of the want of consideration in the transaction between the defendant and the bank, because of which this note was given, to prove himself a holder in due course in fact. This is the equivalent of urging his own negligence and dereliction of duty under the banking laws as an excuse to enable him to establish good faith or actual want of knowledge of the infirmity in the paper, when he would have known such facts and possessed actual knowledge thereof had he performed the duties devolving upon him as president of a banking institution. A court can hardly recognize such a plea. Plaintiff cannot lend his name, and thereby the influence of his probity and wealth, to his resultant benefit as a stockholder and bank official, without incurring the duty of fulfilment of the obligations of the office, including those arising from the presumed notice imputed to him by law as a bank official of the bank's transactions in the ordinary course of its dealings. As the presiding officer of the board of directors, he should not be heard to say he did not know matters presumed to be within the actual knowledge of the board, as an excuse for failure to perform his official duties to the bank, its depositors, and creditors. In the words of *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428, quoted with approval in *Magee on Banks & Banking*, 2d ed. § 107, it is said: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and super-

vision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declarations of dividends. That which they ought by proper diligence to have known as to general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." In *Balfour v. Fresno Canal & Irrig. Co.* 123 Cal. 395, 55 Pac. 1062, quoted in *Magee on Banks & Banking*, 2d ed. § 108, it is said: "A corporation must be presumed to have full notice of all the facts which are known to its president, affecting its interest. It is his duty as the head of the corporation to report the same to the trustees, and it is usually conclusively presumed that he has done so. . . . The corporation has no ears, eyes, nor understanding save through its agents. The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interest of the corporation, and the presumption is that he does so. Usually this is a conclusive presumption. If it be urged that in this instance it was not the president, but the cashier, who received notice of the want of consideration for the note in question, as he negotiated the loan, and that the cashier has more powers of management than the president, we answer, in the words of *Bolles on Banks & Banking*, 333: "There is no longer any essential difference in the authority exercised by them," cashier and president. So, what the cashier knew, the institution and its president in law knew. Of course where manifestly the president, cashier, or director, the presumed agent of the bank, the principal, is acting for his own interests, and from the nature of the transaction adversely to that of the bank or in fraud of the bank, for his personal gain or for that of others with notice thereof, in a suit by the bank or for its benefit a different rule applies, but such is without this case. Such exception is illustrated by cases similar to the following, *viz.*: *E. S. Woodworth & Co. v. Carroll*, 104 Minn. 65, 112 N. W. 1054, 115 N. W. 946; *First Nat. Bank v. Persall*, 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506, 675; *Iowa Nat. Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12; *Peoples' Sav. Bank v. Hine*, 131 Mich. 181, 91 N. W. 130.

Respondent cites the decision of this court in *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99, as sustaining his contention, and

states that the trial court, in denying the motion for new trial herein, relied upon that holding. It is unnecessary to comment on that case further than to say it is not here controlling. That decision turned upon a failure of proof of a defense and error in the admission of testimony in an action by the bank as indorsee and holder in due course against the maker of a negotiable promissory note, and the question there involved was as to the proof of and the amount of knowledge possessed by the cashier of the want of consideration for the note at the time he, acting in behalf of the bank, purchased the note for the bank. The doctrine of imputed knowledge to the bank of the facts known to the cashier is recognized, as it is not questioned; and the decision is based upon the sufficiency of said knowledge presumed to have been known by the bank, to overthrow the presumption that the bank was a holder in due course, and to constitute a defense. And what is there said concerning actual knowledge of the infirmity was said in connection with any duty of the bank as a purchaser to inquire for possible defenses, and that mere knowledge or notice of suspicious circumstances will not defeat a recovery; and that the provisions of §§ 6702 and 6703, Rev. Codes 1905, did not there operate to alter the well-established rule that our negotiable instruments law, in § 6368, permits the buyer of a negotiable instrument to be a holder in due course, without requiring him "to make inquiries as to the purpose for which it was given, or as to the existence of possible defenses. Bad faith is imputed only from knowledge or notice of the fraud or defenses. Mere knowledge of suspicious circumstances will not defeat a recovery;" which was the holding of this court before the passage of the negotiable instruments act in *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867. We may here state that we do not understand *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511, decided under the negotiable instruments act, has been overruled or modified by *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99. This in no wise conflicts with our holding in the instant case, to the effect that a bank president and director, and as such a managing officer of the institution, cannot be heard to claim that he had no notice of any infirmity in the instrument negotiated to him by his own bank; but that instead, the knowledge imputed to him as such officer, of the institution's inability to recover on the instrument because of want of consideration therefor, prevents him

from being a holder in due course, and that the same defenses available against the bank, in a suit by it to collect upon the note, may, because of his relationship to it, be set up in defense of his action.

Our conclusion is that this defense is available against this plaintiff's recovery. And defendant, having been precluded from proving his defense, should be allowed to offer evidence tending to establish the same under the allegations of his answer and the issues as joined. And that upon the proof as made, that this plaintiff is the president of this bank and therefore one of its directors, the defendant has laid sufficient foundation for the introduction of proof of his defense of want of consideration, which, if established, is as binding upon the plaintiff in this action as it would have been upon the bank had the bank instead sought recovery.

Appellant's contention being sustained as to the merits, necessitating a new trial, it becomes necessary to consider the error assigned on the trial court's ruling sustaining the demurrer to the counterclaims for damages specifically plead. We conclude that the demurrer to the alleged counterclaim asking damages for attorney fees was properly sustained, being covered by the statute authorizing taxing of the same as costs in lieu of attorney fees. The counterclaim for \$15 for four days' lost time in endeavors to regain possession by rebonding is insufficiently pleaded, as it does not sufficiently appear that the time alleged to have been so spent was necessarily spent for such purposes. Under proper pleading, and on sufficient proof, we see no reason why defendant should not, if he recovers judgment, be allowed damages for loss of time consumed in regaining possession of his property. As to the counterclaim interposed for the sum of \$15, it does not appear how the expense was incurred, it being impossible to determine from the answer whether the matter is a disbursement in suit or is a subject of claim for damages, and the demurrer thereto was properly sustained.

But that portion of the answer counterclaiming for deprivation of use and possession of said property for a period of four days, during which time said property was detained by plaintiff after it was taken from defendant under claim and delivery proceedings and before rebonding, and for which period defendant claims to recover damages in the sum of \$30, the trial court erred in overruling the demurrer. "Upon the rendition of a verdict for the defendant, he is entitled to an assessment

of damages for the detention of the property and for the taking when wrongful; and this without regard to the fact whether the property has or has not been returned to him. This is for the reason that the return of the property only discharges the judgment for 'its value,' and does not affect the defendant's rights to damages for its detention." Shinn, Replevin, § 639, citing *Haskins v. Everett*, 4 Sneed, 531; *Buckley v. Buckley*, 12 Nev. 423; *School Dist. v. Shoemaker*, 5 Neb. 36; *Burt v. Burt*, 41 Mich. 82, 1 N. W. 936; *Hall v. Smith*, 10 Iowa, 45. "Set-off is not allowable in an action of replevin in the ordinary sense in which it is allowable in other forms of action, but damages growing out of the same subject-matter may be considered in reducing the damages claimed are allowable in the replevin action, and courts are inclined to give the action such flexibility as to adjust all equities arising between the parties in such action." Cobbey, Replevin, § 794, citing authorities. "And generally whatever demand the defendant has growing out of the same subject-matter as the plaintiff's claim may be recouped." Wells, Replevin, § 632. In the words of Cobbey, § 795: "The subject-matter of litigation in replevin is the property mentioned in the complaint." Our statute relative to counterclaim generally, § 6860, provides that "the defendant may set forth by answer as many defenses and counterclaims as he may have," subject to the limitations contained in that section. Under the first subdivision of that section, so far as this case is concerned, this counterclaim to be available must be "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." The case of *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133, upon which respondent relies, we do not regard as here applicable. That decision cannot be considered as announcing the proposition that a cause of action for conversion cannot be set up as a counterclaim in an action upon a contract. In the words of the opinion in *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90, speaking of this decision, it is said: "The case as we read it does not so hold. The court merely held that the cause of action for conversion attempted to be set up in that case 'had no connection, however slight,' with the transaction upon which suit was brought." And *Hanson v. Skogman* is authority for our holding if the damages sought be "connected with the subject of the action." And the damages claimed arise from the dep-

privation of the possession and use of the property mentioned in the complaint, and in the words of Cobbey on Replevin, above quoted, constitute the subject-matter of this action. In fact, the damages are occasioned by the exercise by the plaintiff of a legal right accorded him to take possession of the subject-matter of the action, the property, at the commencement of the action, rather than await the outcome of the litigation determining his right thereto.

Then, again, we regard § 7036, Rev. Codes 1905, as, by necessary construction if not in specific terms, granting the defendant the right to counterclaim for damages for use and deprivation of property. On this demurrer we must, of course, assume to be true the facts set forth in defendant's counterclaim, and are therefore passing upon the sufficiency of defendant's claim under the assumption of his recovery on the merits as to right to possession of the property. Such recovery by defendant under the pleadings can only be had if a total want of consideration be established for the note secured by mortgage. If defendant recovers in the main action, the verdict must conform to the provisions of § 7036, to be responsive to the issues. That section defines the verdict to be returned in every instance that may arise in claim and delivery. Subdivision 3 thereof defines the defendant's rights where the property has been delivered to plaintiff and where defendant recovers, and expressly provides that in such instance, if damages for detention of property are claimed in the answer, the defendant may recover therefor. Subdivision 4 of that section provides that where the property has, pending suit, been retained by the defendant, the jury must find the defendant entitled to such property where they find against the plaintiff. This provision is applicable where the plaintiff has not elected to take the property pending suit. The final provision of subdivision 5 of § 7036 is in our opinion intended to here apply. It reads: "Whenever the jury are so instructed they must find the value of specific portions of the property in controversy, or of the interest of either party therein, if less than its full value at the time of the taking, and shall also assess the damages if any are claimed by the party in whose favor they find sustained by reason of the taking and detention of such property." In other words, the party claiming damages through the taking and detention of replevied property, if entitled to recover therefor and with recovery for such damages not specifically provided for in the preceding

parts of the section, may, under this general provision, be permitted a recovery for such wrongful detention of such property taken. To that extent it is supplementary of the other provisions of § 7036, and also of § 6860, where a recovery is had on a counterclaim. *Tittle v. Kennedy*, 4 Ann. Cas. 68, and note, (71 S. C. 1, 50 S. E. 544); 34 Cyc. 416, subdiv. 4, and authorities.

One remaining matter deserves extended discussion. After the record on appeal was in this court for submission on the merits, appellant's attorney filed in this court affidavits of said attorney and the defendant, accompanied by an affidavit of Minckler, who had been cashier of this bank at all times in issue. With these affidavits was filed a written application to have the record here on appeal remanded to the district court of Benson county, that defendant might, on the record and said affidavits, "move for a new trial on the grounds of newly discovered evidence in this action;" and pursuant to said application, to determine whether to remand for such purposes, an order to show cause was issued by this court, summoning respondent "to show cause why an order of this court should not remove the record and files in said cause back to the district court of the second judicial district within and for Benson county, and the said district court be instructed to entertain an application by the defendant for an extension of time within which to move for a new trial of said action on the ground of newly discovered evidence, if the time for making said motion has expired." On the return day respondent filed a motion, supported by affidavits, asking the court "to quash the order to show cause." This motion is supported by the affidavits of McCarty, reciting at length the entire transaction. Of McCarty's affidavit we will speak later. On the hearing both parties filed written briefs, as well as made oral argument, with the result that the application to remand was denied by order of May 2, 1912. Thereafter the cause was heard on the merits of the appeal. Then an opinion prepared by the chief justice was filed, dismissing the appeal on the court's own motion, on the grounds that the matter stated in the affidavits of appellant on the motion to remand admitted the reception by defendant of \$1,500 as consideration paid by the bank to him on the note in litigation, and that as the value of the replevied property in issue was less than the amount so received his defense thereto was wholly destroyed, and was established to be sham and fictitious. On peti-

tion a rehearing was granted and the case reopened and reargued. The affidavits filed upon which such summary action of the court was taken here follow:

"John Kepreta, being first duly sworn according to law upon oath deposes and says that he is the defendant in the above-entitled action; that the facts in connection with the making and delivery of the note for \$2,000, secured by the mortgage under which plaintiff is by this action attempting to recover, are as follows, and not otherwise: That in the fall of 1908, I had immediate use for the sum of about \$1,800, and made arrangements with the Farmers & Merchants State Bank of Knox, of which said plaintiff was president then, whereby said bank would advance me the money needed, and it was agreed at the time that affiant was to allow the said bank a bonus of 10 per cent on the amount agreed on to be advanced, and in addition thereto was to pay interest at the rate of 12 per cent per annum from the date of the note; that the total sum of money which was agreed on to be advanced was \$1,800, and no more."

Also was filed the following affidavit:

"J. A. Minckler, being first duly sworn, on my oath depose and say that I reside at Knox, North Dakota, and was a resident of Knox, North Dakota, during the year 1908, and that during said year I was the cashier of the Farmers & Merchants State Bank of Knox, North Dakota, of which said bank the above named plaintiff, John McCarty, was president; that in the fall of 1908, one John Kepreta made an application to said bank through me as its cashier, for a loan of sufficient money to take up his then outstanding indebtedness, which was established at that time to be about \$1,800 over and above the value of his crop for that year, then threshed but unmarketed;

"That in said fall of 1908, after the said application of the said Kepreta was made to me, I had a conversation with the said John McCarty, in the month of October, 1908, and just prior to the taking of the \$2,000 note involved in the above-entitled action from John Kepreta, in which I told him the proposition and arrangement I had with Kepreta, which was as follows: John Kepreta was to execute the said note of \$2,000, and was to receive actually only \$1,800, and the other \$200 was to be a bonus for making the said loan; and he was to give the note for \$2,000, and pay 12 per cent interest on the whole \$2,000. John Mc-

Carty replied by telling me to go ahead and make the loan on that basis, and that he would take it up for himself, instead of the bank, provided I could obtain a sufficient chattel mortgage to secure the \$2,000 note. On the 12th day of November, 1908, John Kepreta signed the note for \$2,000 involved in this action, and also the chattel mortgage securing the same, and involved in this action, and on which the action is based. The Farmers & Merchants State Bank of Knox, North Dakota, *advanced to John Kepreta thereon, on the 12th day of November, 1908, the sum of \$1,500, and the note was, on the 12th day of November, 1908, registered in the books of said bank and carried thereon at a \$1,500 loan.* On the 8th day of December, 1908, John McCarty came into the bank at Knox, and the said note and mortgage were turned over to him by me, and he paid for the note and mortgage the sum of \$1,813, the \$13 of which represented the interest at 12 per cent on the \$2,000 note for twenty-six days, which had accrued thereon to that date, *and John Kepreta's account at said bank was credited with the sum of \$300, and no more; that the sum of \$1,800 was all that said John Kepreta ever received from the Farmers & Merchants State Bank of Knox, North Dakota, for the said note.* The \$13 was credited to the interest account, and the \$1,500 item was canceled from the notes and discounts; that at the time this John Kepreta note of \$2,000 was taken by said plaintiff, John McCarty, he also bought a note of one O. P. Rambo, from the said Farmers & Merchants State Bank of Knox, of the sum of \$725, and accrued interest thereon in the sum of \$5.80, which, added to the \$1,813, made a total of \$2,544.70, for which sum he gave a check on the Security National Bank of Minneapolis, in the state of Minnesota, dated December 8, 1908, and which was paid by said Security National Bank on December 10, 1908.

"Dated this 4th day of April, 1912."

We italicize that part of the foregoing particularly under consideration.

With these affidavits was also filed that of one of the attorneys of record for defendant and appellant. He recites the history of the trial, and the appeal; "that on the 4th day of April, 1912, for the first time this affiant, and also the defendant, discovered that there was a good, meritorious, and valid defense to the whole, or to a great part, of the claim of the plaintiff, and also discovered evidence to substan-

tiate his defense in the said action, that is, that the said McCarty, plaintiff, was not a bona fide holder of the said note and mortgage, but that he took the same subject to the defense of *mala fides*, and was not a purchaser in due course, and without notice, and that his evidence to the effect that he knew nothing of any defense or defect in said note for \$2,000 was false; and that the said plaintiff knew, before the said note was taken, all of the facts and circumstances in connection with the execution and delivery of the note and mortgage, and was a party to the whole transaction from its inception to the close thereof, and at the time the same was indorsed to him; and also this defendant can now prove, and has discovered evidence to show, that the evidence of the plaintiff, wherein he stated that he paid the full face of the note and interest thereon to the date of the purchase of the same by him, was and is wholly false; but this defendant can prove that he did not pay the full face of said note; that he only paid the sum of \$1,813 for the same, and that he knew when he took the same that said note was usurious and was procured from the said Keprata by fraud; that this defendant is now able to and can and will prove, if given an opportunity, that the said plaintiff, McCarty, was not a bona fide holder of the said note and mortgage, and that he knew the same was usurious when he took the same from said bank, and that he knew the nature of the note and the usurious character of it, and made the agreement for the taking of it through the cashier of said bank, one J. A. Minckler, as shown by the affidavit of said Minckler, which is hereto attached and made a part hereof by reference; and these facts this affiant now states can be proven by the said Minckler, and also by one Bidne, who was at that time an employee of said bank, and who was present at and heard the conversation between Minckler and the plaintiff, McCarty, which is referred to and set out in the affidavit of said Minckler hereto attached and made a part of this affidavit; and also by the books of said bank." Then follows a statement tending to show due diligence in making this application, and the reasons why such newly discovered evidence was not procured and used at the former trial; also: "that John Keprata is an ignorant, illiterate foreigner, and is unable to understand the nature or effects of his acts, and was too ignorant to, and in fact did not know anything of the plaintiff, McCarty, in the transaction whatever, and did not know the legal effect of usury in connec-

tion with the giving of said note, and did not, at any time, inform the said affiant herein or any of his attorneys of any fact or facts showing usury in connection with the transaction, but always claimed and maintained that he did not get any part of the consideration for which the note was given."

"That said evidence is vital and very material to the defense in this action." "That the time fixed by the statute of the state of North Dakota within which to move for a new trial has expired in this case."

On these affidavits the opinion was based, short-circuiting the merits of the appeal and summarily dismissing it, working an affirmance of the judgment appealed from, on the theory that the affidavits constituted a solemn, written, judicial admission made in the case that the defense was without merit. In considering whether this conclusion was correct, many matters other than the statements contained in the affidavits themselves are to be considered. We here observe that the affidavits have in no wise misled the opposing party, nor have they been acted upon by him, but instead were acted upon by the court on its own volition. In fact, until the decision was rendered we have every reason to believe respondent must have been as wholly in ignorance of any such contemplated action of this court or the effect of these affidavits to work such dismissal as was appellant, who filed them. There is, then, no element of estoppel in this case. The question for determination is whether the matter contained in the affidavits, taken in connection with the matters embraced in the entire case, and issues presented, and now also in the light of the explanation made of their filing, as explained in the petition for rehearing and the subsequent argument of appellant, must or should be taken by this court as a judicial admission of want of merit in the defense litigated in the lower court and now before us on appeal. Most surely, before thus treating property rights presented in good faith on an appeal, this court must be certain that such disposition is the only reasonable one to be made, consistent with the rules of procedure applicable. And such we find the declared law. Chamberlayne's Evidence, vol. 2, § 1242, from which we quote: "Judicial admissions should receive a reasonable construction. Thus it will not be assumed, without strong reason, that an admission by counsel covers the point on which the entire case turns. The rule has even been stated to be that where the concession of counsel is ambiguous its mean-

ing should be determined by the party who made it." Citing *Hoffman v. Bloomsburg & S. R. Co.* 143 Pa. 503, 22 Atl. 823; *Wright v. Dickinson*, — Mich. —, 42 N. W. 849. And when we find the admission so sought to be given the force of a judicial admission is contained in some affidavit or pleading subsequently amended or superseded, it must be a judicial admission beyond all question to thus operate to foreclose the rights of appellant regardless of merit. *Wigmore*, Ev. §§ 1064, 1067, 1075 and 2594. The filing of the affidavit of a third person as a part of a record in a case, and for a specific purpose, may be the adoption of such affidavit by the party in whose behalf it was filed, and the affidavit become the statement of a party to the suit for the purpose for which it was filed, and may constitute an admission. *Wigmore*, Ev. § 1075. But whether such admission be conclusive of the interests of the party to the litigation, or whether it be an ordinary admission, the probative force of which is to be weighed as mere evidence, is dependent upon whether the admission amounts to a judicial admission, or instead is a mere quasi, extra-legal, or ordinary admission. The distinction between these classifications, as ordinarily drawn by the the text-book writers, are clearly shown in the exhaustive treatises on Evidence of *Wigmore* and *Chamberlayne*. And especially consult the latter at chapter 17, beginning at § 1232.

A judicial admission, strictly speaking, is a matter determining procedure regardless of proof in the case or probative force of the admission. A plea of guilty, an unqualified admission of the facts of a case to avoid a continuance, or any stipulation or admission conceding a matter in issue and waiving proof, as a formal admission of fact or issues in a pleading, are examples. A judicial admission relates primarily to procedure. *Chamberlayne*, Ev. §§ 1234 et seq. Other admissions of various kinds are matters primarily of evidence only, more or less conclusive, according to the weight to be attached to them as evidence only, and their force or effect being determined with all the facts in the case and on trial. With this in mind, let us determine whether, under all the circumstances, the contents of this affidavit amount to written judicial admission, and if so, whether any discretion lies as to the effect of the same upon this suit; that is, whether the court has any alternative than to dismiss this appeal.

We first notice that the affidavits are filed as a part of procedure to

procure a new trial upon a specific ground, *viz*: that of newly discovered evidence, with such affidavits reciting such newly discovered evidence. No intimation is given in the application, nor in the brief accompanying it, of any change of position by appellant on the merits should he be granted a new trial, and nothing contained in the affidavits is inconsistent with the position maintained by him throughout the trial below or the matters urged on this appeal. He has contended from the first his right to successfully defend because of a total want of consideration for the note as between defendant and the bank, and based upon either the actual knowledge had by the president, this plaintiff, of such fact, or constructive or imputed knowledge by law in him of such total want of consideration, and arising because of his relationship to the payee in the note, the bank; with the conclusion in either case that he may defend against plaintiff as he could have done against the bank, on the grounds of a total want of consideration. Under defendant's theory of his defense, and in line with offers of proof on trial, anything establishing usury in the note imputes conclusively to the president of the bank, this plaintiff, knowledge of the facts and circumstances under which the note was executed and delivered, including a total want of consideration. And such is the law under the authorities heretofore cited in this opinion. The affidavits presented, then, while tending to establish usury, warrant no assertion that defendant has changed his defense from that pleaded and tried below, based upon such alleged total want of consideration. And the affidavit of Minckler tends to establish actual knowledge of the usurious nature of the transaction. And in this connection we must remember that, under the proof and these affidavits, if defendant's defense is true and meritorious, this plaintiff and Minckler were concerned jointly in working a fraud upon defendant. Then in reason, unless unavoidable, the mere affidavit of either Minckler or McCarty at this stage of proceedings should not be permitted to work a forfeiture of the rights of defendant, perhaps to their own mutual benefit. But let us analyze these affidavits. That of defendant recites merely an agreement whereby he was to receive \$1,800 for a note of \$2,000. It is of significance that the affidavit of his attorney, filed with the affidavit of Minckler, still asserts that defendant "always claimed and maintained that he did not get any part of the consideration for which this note was given." And that he pur-

poses, if given a new trial, to use testimony obtainable from Minckler and the books of the bank in establishing actual and imputed knowledge in plaintiff of his defense of total want of consideration. It is true that he, as attorney for defendant, has filed in this court the affidavit of Minckler, stating that he, with the knowledge of plaintiff, entered into an agreement to exact, in effect, usury, from the defendant. And that the bank of which he was cashier "advanced" to Kepreta \$1,500, and thereafter Kepreta's "account at said bank was credited with the sum of \$300, and no more." But this affidavit does not state positively and unequivocally that Kepreta was paid \$1,800, or any part thereof, or that he received any cash or its equivalent from said bank in the sum "advanced" as the consideration for the note in suit. These affidavits come into this record as a matter other than that of record in the case, and if they may be considered for any purpose other than that for which they were filed, then most certainly the explanation of said affidavits as contained in the written argument of appellant filed on this petition for rehearing, and, as advanced orally on rehearing, may be considered on this question. Concerning this, defendant states that he is ready to prove that, notwithstanding the affidavit of Minckler, defendant "never got a cent of the proceeds of this note," and "could have shown you that this money was never checked out," "was never intended to be checked out, but was to be used for another purpose," quoting from the written argument. So that from the standpoint of the defendant both statements may be true, as could be by the simple act of bookkeeping, by the crediting on the books such "advance," but refusing to honor checks on it or any right of defendant to apply it, resulting in defendant never actually receiving a dollar of the so-called "advances." Or again, this bank may have wrongfully applied such advancement in disregard of defendant's legal rights, with the result that he has received nothing as a consideration for the loan, and would have the right to assert such total want of consideration against the bank and its president, this plaintiff.

And at this place we may briefly consider, with Minckler's affidavit, the explanation of the plaintiff himself, also made by his affidavit, in support of his claim of absolute ignorance of any want of consideration or usury in the note. Contrasting the affidavits of McCarty and Minckler, it is noticeable that \$200 less than the face, and interest, for two

notes, this one in suit, of \$2,000, and another note of \$725, was paid by McCarty to the bank. Minckler claims this \$200 was discounted from this note in suit; McCarty that it was discounted from the \$725 note instead. Minckler's affidavit states the exact amount paid by McCarty to the bank to have been, in items, \$1,813 for the note in suit, and interest thereon, and \$725 and \$5.80 interest thereon, or a total of \$2,544.70. McCarty admits paying only this amount for them. The only disagreement between the two is as to which note was discounted. McCarty's affidavit admits that but \$1,800 of the note in suit was credited on the books of the bank, "and as I understood it, that Minckler wanted the other \$200 to cancel his personal claims against Kepreta. Minckler had charge of the books of the bank at the time I purchased these two notes, and I paid no attention to the same, or any of the entries that he had made in connection therewith, until the examination just spoken of, made by me about the time this suit was commenced; that if there was any juggling of the books it was done by said Minckler to serve his own purpose." Minckler charges McCarty with taking usury in connection with this note in the sum of \$200. McCarty charges Minckler with taking \$200 for his (Minckler's) "personal claims against Kepreta," and intimates a possible "juggling of the books" of the bank. Should justice work overtime under the circumstances disclosed by these uncertain affidavits to deal summarily with the defense here plead, in the face of such admissions, all *dehors* the record and after judgment? Rather it would seem, as heretofore stated, that any substantial doubt should be resolved in favor of a trial on the merits, under these admitted circumstances surrounding the giving of this note. Appellant has also, by written statement and orally on argument, explained Minckler's affidavit, from which explanation it appears that, in addition to what has heretofore been said, the affidavit of Minckler was dictated by Minkler, concerning the contents of which Minckler would permit no change, so that it was either use the affidavit as it was signed, or abandon any benefits appellant might receive under it on an application for a new trial.

While we do not believe that any conspiracy existed in the offering of this affidavit, as between Minckler and McCarty, inasmuch as none of the counsel in the case would countenance such practice, and all were in ignorance of any such application of them as made heretofore by the

court, yet to say, under these circumstances, that appellant must be bound as by a judicial admission by every statement contained in Mincklers' affidavit, and defendant's rights under the appeal abrogated, would be to put a premium upon conspiracy and permit a party to a suit and a witness, pending a meritorious appeal, to rid themselves of a possible future disagreeable retrial.

But we are not bound to dismiss the appeal, even though we grant that the affidavit filed may amount to a judicial admission. A court may, at its discretion, upon proper showing, relieve from a judicial admission. See Greenleaf on Evidence, 16th ed. vol. 1, § 206, from which we quote: "Where judicial admissions have been made improvidently and by mistake, the court will, in its discretion, relieve the party from the consequences of his error by ordering a repleader, or by discharging a case stated, or the rule, or agreement, if made in court. Agreements made out of court between attorneys, concerning the course of proceedings in court, are equally under its control, in effect, by means of its coercive power over the attorney in all matters relating to professional character and conduct." See also 1 Enc. Ev. 476.

We quote from § 1240, Chamberlayne's Evidence, as follows: "While a formal judicial admission constitutes the *levamen probationis* until modified or withdrawn, the admitting party is not necessarily precluded by it. A showing of mistake or inadvertence may secure him relief from the court. The entire matter is within the administrative function of the court. If it shall be made clearly to appear to the judge that a particular formal judicial admission has been made imprudently and by mistake, the court may, in the exercise of its administrative powers, relieve parties from the consequences of their mistake, by allowing them to withdraw the admission. In the same manner, a party under the rules of practice prevailing in a particular jurisdiction may be allowed to alter the admissions contained in his pleadings, by an amendment,"—citing authority. To the same effect see § 2590, Wigmore on Evidence, reading: "The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, *i. e.*, the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it. In view, however, of the commendable purpose which leads (or ought to lead) to

the voluntary making of admissions, it is always, and properly, said that the trial court may, in discretion, relieve from this consequence."

Most authorities cite and quote from *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600. In the note to *Wigmore on Evidence* we find the following quotation from said case, and here particularly appropriate: "Such agreements are sometimes made to avoid continuances or for some other specific purpose, and by their terms are limited to the particular occasion or purpose, and of course lose all force when the occasion has passed or the purpose has been accomplished."

There can be no doubt of the right of the court under the authorities, even though the affidavit of this third party be considered as a judicial admission of defendant, to relieve defendant from its force by ignoring it except for the purpose of which it was filed, in this case long ago ruled upon by this court and superseded by subsequent proceedings concerning the merits of the case on appeal.

Then, too, his affidavit was filed, not by the party defendant, but by his attorney; and if it be held to have been adopted thereby as the declaration of the party, it must have been the act of the attorney, perhaps unknown to or not understood by the client, in thus using the affidavit of a third party that would be construed as decisive of this case against said client. And in the affidavit of the defendant, filed with the affidavit of Minckler, we find no statement of knowledge of the contents of Minckler's affidavit or any corroboration thereof that goes to the extent of verifying the statement in Minckler's affidavit that money was advanced defendant as the consideration for said note. In fact, in the affidavit of the attorney filed with the other two affidavits, we find the statement, "that the defendant has always maintained that he never received anything as consideration for the note," which, if considered with the affidavit of Minckler and given the same construction that must be given to Minckler's affidavit, to allow the latter to constitute a judicial admission would amount to a denial or repudiation of the affidavit of Minckler, filed contemporaneously with the Minckler affidavit. The admissions, if they may be so construed, contained in Minckler's affidavit, are but analogous to admissions made in a pleading concerning which much conflict exists as to the extent to which a client is bound when the pleadings embody judicial admissions. 16 Cyc. 968, where it is said that it "would be pushing the relations of attorney and

client to an unwarranted extent to hold the client responsible for any inconsistency between statements made in the pleadings." It is doubtful if the act of the attorney in the filing of this affidavit, conceding that it be a judicial admission, would bind this defendant, without proof of knowledge in the defendant of the contents of said affidavit.

In what has been said heretofore it has been taken for granted that the statements contained in Minckler's affidavit amount to a judicial admission. To give such effect would overlook the fact that the application to remand, to support which they were filed, was denied, and is no longer before us for review or for any other purpose. The application and the supporting affidavits are all superseded matter, and are no longer before the court for any purpose, and any statements therein may only still "be competent as extrajudicial admissions. To be so used, the superseded pleading must be introduced in evidence, must be shown to have been originally made as a statement of fact, and connected directly with the party himself, as having been made, or authorized and inspired by him. It is not sufficient that the attorney signed and filed the original pleading." 16 Cyc. 971. This affidavit should not now be treated as more than an extrajudicial admission.

But it is urged that in any event the affidavit having been offered by defendant, all statements therein must be taken as true, and no part of it can be questioned. Wigmore on Evidence, § 1075, effectively answers this contention.

"If a party expressly states that a certain piece of testimony by another person is correct, there can be no question that it becomes his statement by adoption, and is receiveable as his admission. But does he by implication approve and adopt as his all the depositions, testimonies, and affidavits that are offered on his behalf in a litigation, so that in a subsequent litigation these may be used against him as his admissions? It is true that the rule against impeaching one's own witness was once explained upon the theory that a party guarantees the credibility of his witness and (by inference) the correctness of the witness's statements." § 898. "But that impossible theory has long been exploded, and cannot serve here." § 899. And as an extrajudicial admission under all of the authorities, any statements contained in these affidavits might be explained, qualified, or controverted on retrial.

For the foregoing reasons we do not feel justified, from this partic-

ular affidavit alone, to conclusively presume the defendant received \$1,500, or any money at all, as the consideration for the note in suit, the affidavit being general and uncertain, and contrary to the claims of defendant in his pleadings, his offers of proof on the trial, and the theory of his defense throughout. Besides, the explanations of his attorney as to how the affidavit was given, and why the same was filed for use only for the particular purposes and application made, established beyond question the fact that, in an endeavor to procure a new trial, his counsel have, without any concealment or endeavor to mislead, and that this court might know the entire situation, filed this affidavit of a third party, who, should he testify to all the matters therein recited, would not necessarily preclude defendant's defense, but would leave to the jury an issue on the credibility of the third party and the defendant. We feel that because defendant has disclosed the part of the newly discovered testimony that would be prejudicial to him as well as the beneficial portion, he should not be penalized therefor by using the affidavit for a purpose wholly without the contemplation of both parties, in a manner that would, in effect, work a forfeiture of his appeal on the merits, when the discretion rests with us as to whether such an extreme holding shall be made.

This case is remanded for a new trial, appellant to recover his costs and disbursements on this appeal, but excluding those on the reargument had on the rehearing granted herein.

SPALDING, Ch. J. (dissenting). While disposed to think it might be the part of wisdom for the legislative assembly to prohibit an official of a state bank from dealing in commercial paper taken by the bank, or at least from asserting a good faith purchase from the bank by himself, I am by no means clear that the law as it now stands considers a bank official, and particularly one who does not participate in the active, personal management of the bank, in any other light than as a stranger to the entity known as a bank, in such dealings; and the authorities cited to the contrary in the majority opinion on this question are not convincing, especially when the whole of each is read. But, as I deem it unnecessary to pass upon the merits of this case, I refrain from any expression of opinion thereon.

I am of the opinion that the decision is wrong, and I cannot concur

therein. Plaintiff, at the time this action was brought, was president of a small bank at Knox, organized under the state law. He resided in Minneapolis, Minnesota, something like 400 miles from Knox. He had nothing to do with the personal management of the bank, but visited it two or three times per year, as suited his convenience. The man Minckler was cashier and the executive officer. The loan was made by Minckler and subsequently the note was purchased from the bank by McCarty, and, as the record stands, *in the utmost good faith and without knowledge or suspicion, or even grounds for suspicion, of any defense in fact.* On the maturity of the note, payment being refused, this action was brought to recover possession of the chattel security; and an answer was interposed setting up, as a sole defense, total want of consideration for the note, and alleging a bad-faith purchase by McCarty.

In April, 1912, after appeal from the judgment herein, defendant submitted a motion to have the record remanded to the district court to enable him to submit a motion therein for a new trial on the ground of newly discovered evidence. That motion was argued in this court and denied, and the reason for its denial was the fact that the allegations of the affidavits on which the motion was predicated negatived the defense contained in the answer, and that, although there might be a partial failure of consideration, such affidavits showed that a defense of partial failure of consideration would be of no avail, as plaintiff would still be entitled to possession of the security for foreclosure purposes. Subsequently the case was argued on the merits, and this court, after very careful consideration, agreed on the disposition of it, and dismissed the appeal. A most remarkable document was subsequently filed in this court, asking a rehearing. The court decided, in view of all the circumstances, it was best to give the parties an opportunity to be heard on the dismissal of the appeal, and on the rehearing this was done. Nothing developed that was unknown to the court at the time the original opinion was written in any way tending to diminish the force of the decision dismissing the appeal. On the contrary, it seems to me that the reasons for doing so are emphasized at this time.

I shall not set out the affidavits presented, as they are sufficiently stated in the latter part of the opinion of my learned associate. It must be borne in mind that the defense pleaded was total want of considera-

tion. Now, the affidavit made by the defendant himself, presented to support the motion, states that arrangements were made with the bank whereby it was to advance to him money needed for certain purposes; that it was agreed that he was to allow the bank a bonus of 10 per cent on the amount agreed on to be advanced and to pay interest in addition; that the total sum of money which was agreed on to be advanced was \$1,800, and no more. Defendant adroitly ends his own affidavit at this point, from which his version of the transaction is continued by Minckler. Now, the version given by the defendant himself conflicts with and destroys the defense on which he was standing at the trial in the district court. The agreement to advance money to him was a sufficient consideration for the note. If he relied on a subsequent failure of consideration, or partial failure, he should have so pleaded; but this would have been useless to him, because McCarty could maintain his action if anything remained due on the note, or so long as it was proved that there was any consideration. I do not know how a stronger expression could be used indicating that \$1,500 was paid to the defendant, than was used in the affidavit made by Minckler, presented at the time the motion was made, vouched for by the defendant in so presenting it, wherein he says the bank advanced him \$1,500 in cash, and gave him a credit on its books for \$300 more. It may be that the affidavits do not warrant a statement which was made in our former opinion, to the effect that defendant desired to change his defense from want of consideration to usury. Yet, notwithstanding the strenuous contention of counsel that we were not justified in this statement, in view of the affidavit made by counsel himself, we think we had some reason for concluding that this was the real purpose for which the affidavits were made. Counsel made an affidavit in which he stated that, "on the 4th day of April, 1912, for the first time this affiant, and also the defendant, discovered that there was a good, meritorious, and valid defense to the whole *or to a part* of the claim of the plaintiff." And in the same affidavit he refers to the knowledge of the plaintiff in this manner: "And that he knew when he took the same that said note was usurious. . . . That this defendant is now able to and can and will prove, if given an opportunity . . . that he (plaintiff) knew the same was usurious when he took the same from said bank, and that he knew the nature of the note and the usurious character of it, . . . and these

facts this affiant now states can be proven by the said Minckler." But, however this may be, the defendant is, or ought to be, bound by his own affidavit. He has predicated his motion upon it, and upon the affidavit of Minckler and that of his counsel; and it seems to me to be trifling with justice to hold that he may blow hot for one purpose and cold for another, as the necessities of his case may require; that he may assert Minckler is telling the truth in part of the affidavit and falsifying in another portion; or that he may aver at one point in the litigation that there was never any consideration, and at his convenience change his assertion to the admission that he had received \$1,800 as the consideration, and yet hold the other party bound by all the conflicting allegations of the defendant, who is bound by neither. Defendant moved himself out of court unless this court is maintained for the purpose of gratifying the curiosity of idlers who wish to submit moot questions. This is not affected by the fact that the court did not dismiss the appeal immediately after the motion referred to was made. The full force of the affidavits undoubtedly did not impress itself upon the minds of the court at that time. I quote from the first opinion, to which all members of this court then agreed:

"From the solemn declarations, under oath, of the defendant and his witnesses, it is clear that the defense on which he stood in the district court, on which the case was tried and judgment entered, and on which the argument of the appeal proceeded in this court, was purely fictitious, sham, and false. To reverse the judgment now would be to permit the defendant to set up a defense, stand on it two years, through the district court into this court, knowing all the time that it was false, get a decision in his favor on some error in the admission or exclusion of evidence relating to the false issue, mulct the plaintiff for costs, and then adopt a new theory and a new defense, and solicit the assistance of the courts to relieve him from the fraud perpetrated upon his counsel and the courts."

"It is not a case where the defendant relied on other parties for knowledge of his defense. He knew at the time his answer was prepared that he had in fact received consideration for the note, just as well as he did when, on the 6th day of March, 1912, he came into this court seeking to abandon his defense and substitute a new and different one, and was denied such relief. His attorneys were ignorant of the

facts, but this did not relieve him from responsibility or from the duty to disclose and make the defense which he claims to have had, rather than one which he knew he did not possess. . . .”

“If courts can be played and juggled with in this manner they deserve to become subjects of ridicule and contempt. If the money of the taxpayers can be collected to maintain courts engaged in settling issues which are confessedly fictitious, every taxpayer may well protest and every party to bona fide litigation has just ground for complaint at delay in the conduct of his litigation occasioned by the time and energy of the court being devoted to questions confessedly without merit.”

We further stated:

“In no view of this case does the verdict and judgment work injury or hardship to the defendant. The value of the property involved was stipulated by the parties to be \$875,—more than a thousand dollars less than the face of the note, and less than half the amount that the defendant confesses he received as the consideration for the note.”

A usurious note is not invalid, and plaintiff was entitled to the possession of the security if any part of the debt was due and unpaid. Appellate courts, on attention being called to the fact that questions presented are no longer concrete, decline to act on them. See: *Re Kaeppler*, 7 N. D. 307, 75 N. W. 253; *Foote v. Smith*, 8 Wyo. 510, 58 Pac. 898; *Sutcliffe v. McSweeney*, 102 Ga. 807, 30 S. E. 268; *Meyer v. Prichard*, 131 U. S. CCIX, Appex. and 23 L. ed. 961; *Berry v. Des Moines*, 115 Iowa, 44, 87 N. W. 747; *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424; *State ex rel. Daniels v. Prosser*, 16 Wash. 608, 48 Pac. 262; *Territory ex rel. Hubbell v. Dame*, 13 N. M. 467, 85 Pac. 473; *Lindley v. Atchison, T. & S. F. R. Co.* 47 Kan. 432, 28 Pac. 201; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *The Harry*, 9 Ben. 524, Fed. Cas. No. 6,147; *State ex rel. Hahn v. Westport*, 135 Mo. 120, 36 S. W. 663; *Watkins v. Huff*, 94 Tex. 631, 64 S. W. 682; *Southwestern Teleg. & Teleph. Co. v. Galveston County*, — Tex. Civ. App. —, 59 S. W. 589. Examination of these cases will disclose that they originally presented questions for determination. In the case at bar one was presented, but one which, in fact, did not exist, and this is conceded by the defense in presenting the affidavits of Kepreta and Minckler. Courts are constantly acting upon statements of counsel made on argument, waiving assignments of error contained in briefs,

and concessions made by counsel that issues are narrower than are stated in their briefs, and on many similar questions; and we see no reason why the solemn declarations of the appellant, made in the manner indicated, should not serve the same purpose. In *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539, the Supreme Court of the United States says: "The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced." And: "In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. And if, in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case."

In *Re Kaeppler*, 7 N. D. 307, 75 N. W. 253, the appellant instituted, under the state law, involuntary insolvency proceedings against the respondent, who contested them. The court found in favor of the respondent, dismissing appellant's petition. An appeal was taken to the supreme court. In the meantime respondent himself filed a voluntary petition in insolvency proceedings, and thereupon was adjudged insolvent, and the court declined to pass upon the question presented on the appeal from the judgment dismissing appellant's petition, and held that in such cases and all similar cases the appellate court will dismiss the appeal on the ground that judicial tribunals are not organized for the purpose of rendering decisions which can be of no possible advantage to the parties to the litigation. And numerous authorities are cited, to which we call attention, supporting the court's conclusion, most of them cases where the condition arose after the appeal had been perfected.

Counsel's great excuse is that his client is ignorant, and could not comprehend and did not understand court proceedings or the effect of any given set of facts in law or otherwise. This may be conceded, but it in no manner excuses appellant for concealing the facts regarding the transaction from his counsel. He knew the facts about it, whether he knew what part of them might constitute a defense or not. I do not

deem it a question whether the affidavits or attitude of appellant have misled plaintiff, nor whether he has acted upon them. The question is, "Shall this court devote its energies—of which this case has taken its share at least—to the solution of questions not in litigation?" The explanation of counsel furnishes no solid ground on which to stand. I have no doubt that counsel was surprised at the dismissal by the court on its own motion. He had no occasion to be, however. The zeal of counsel often leads them beyond the mark, but that does not warrant a court of last resort in shutting its eyes to the pleadings or admissions on one side of a case. The affidavits presented showed conclusively that he could not maintain, on a new trial, the defense interposed and relied upon at the former trial, and the facts disclosed revealed a total lack of any other defense in an action of claim and delivery, and, instead of counsel trying to shield his client after the facts were disclosed to him, he should no longer permit this court to be imposed upon, but should himself move a dismissal of the appeal.

It is said that this affidavit does not state positively and unequivocally that Kepreta was paid \$1,800, or any part thereof, or that he received any cash or its equivalent from said bank in the sum advanced as the consideration for the note in suit. This is a mere distinction without a difference, when the affidavit says that the bank advanced Kepreta \$1,500, and no more. "Advance,—to furnish, as money or other value, before it becomes due, or in aid of an enterprise; to supply beforehand, as a merchant advances money on a contract." Webster's International Dictionary. The meaning as used in these affidavits is clear. It means money paid by the bank to Kepreta at the time or before he gave this note.

His affidavits are something different from the ordinary affidavit which may be used in evidence as indicating that a party has taken conflicting positions on a question, but they were here solemnly vouched for by the appellant himself. No court should permit a party to profit by and speculate on his ability to draw affidavits of a fine-spun sort for purposes of delay, and when he intermingles facts showing his position on the merits false, let him be heard to say that it should take notice of only those allegations favorable to him. A great deal might be said on this subject, but it seems to me that its naked statement ought to be sufficient. It is very easy to find authorities apparently supporting any

proposition. The defense was total want of consideration. The affidavit of defendant and his witness both show a valuable consideration; and even had the defense been failure of consideration, they concede the receipt of the amount the note represented within \$200, and hence show no defense to either form of action. The defendant presents these affidavits as entitled to the fullest credit. The decision, in effect, holds them not binding, because defendant would be permitted to impeach them on trial and to have a jury pass upon their truthfulness.

While this may or may not be correct, I do not deem its correctness of much importance. Neither do I consider the question of estoppel necessarily controlling. For the purposes of this discussion it may be conceded that the defendant was not, by the adoption and presentation of the affidavit of Minckler, estopped to prove a partial failure of consideration. This would not help him, for the reasons hereinbefore stated. Neither should it matter if he may be allowed to impeach these affidavits on a retrial. For the same purpose this may be conceded. From this standpoint, is it the part of wisdom, does it tend to promote justice between litigants, is it a wise use of the powers and functions of a court, to devote its time to considering such matters, and permit the defendant to make repeated changes in his attitude toward the litigation, taking contradictory and conflicting positions with reference to the rights of the plaintiff, when, if his statements are accepted at their face, they conclusively show that he has no defense to the action brought by the plaintiff?

But is it simply a question of evidence? Let us inquire what Mr. Chamberlayne, an authority cited to support the decision, says. "For forensic purposes, admissions may be classed as judicial or extrajudicial. The judicial admission is one made on the record or in connection with the judicial proceedings in which it is offered in evidence. An extrajudicial admission is one *in pais*, not made in court for the purposes of the case on trial in which it is offered." 2 Chamberlayne, Ev. § 1233. And, again: "According to the proportion in which the elements of procedure and logic respectively enter into their effect, judicial admissions may be treated in two general classes,—formal judicial admissions and those which are informal. In case of the formal judicial admission, the influence of the element of procedure is supreme. That of logic is practically absent. This fact removes formal judicial

admissions, properly speaking, entirely from the domain of evidence. . . . Exhibiting such an admission to the tribunal is not to produce proof. It is not even to prove a *prima facie* case. It is final, conclusive, irrebuttable by evidence. It is a fact to which procedure assigns a definite value. It is in no sense evidence of a fact, amenable to the rules of logic." 2 Chamberlayne, Ev. Sec. 1238.

I shall not refer in detail to the authorities cited in the opinion on this question. It is sufficient to call attention to the fact that some of those to which apparently the most weight is attached, in no manner sustain the points to which they are cited. The quotations which I have made from Chamberlayne are contained in the long chapter cited in bulk in the majority opinion, and show the distinction between judicial admissions and extrajudicial admissions; and a further inspection of that chapter and the statements in the majority opinion, I think, disclose a misapplication of the law relating to extrajudicial admissions to this case. The definition of judicial admissions is applicable herein and to the affidavits under consideration. They were made in this case, filed in this case, and used in this case, and are therefore judicial admissions, the effect of which is defined in the quotation I have used. The further quotation contained in the majority opinion, from § 898 of Wigmore on Evidence, relates to admissions made in one case and sought to be used in subsequent litigation,—that is, in another case. Finally, I may say that I am impelled to my conclusion by the obvious effect, if not purpose, of acceding to defendant's demands. This effect is to grant a new trial, which cannot legally afford the defendant relief in this action; and as to all questions, except the law as to the president of a bank being a due course purchaser, it simply amounts to giving the defendant an opportunity to produce evidence which he might, with the slightest effort, have produced at the former trial, and which he will now be enabled to obtain by this indirect method of applying for a new trial, and on grounds on which a new trial is never granted, even when application is made to the trial court.

In my opinion the appeal should be dismissed.

BRUCE, J. I concur in the above opinion.

PRICE v. CITY OF FARGO, North Dakota, A Municipal Corporation, V. R. Lovell, Mayor of the City of Fargo, E. R. Orchard, Auditor of the City of Fargo, C. H. Mitchell, Treasurer of the City of Fargo, and James Kennedy.

(139 N. W. 1054.)

City charter — statutory requirements — municipal contracts — good faith.

1. In the absence of charter or statutory requirement, municipal contracts need not be let under competitive bidding. In such cases the corporate authorities are only required to act in good faith and to the best interests of the municipality.

Bids — lowest bidder — taxpayer — fraud — proof.

2. Where bids are requested, but there is no law requiring competitive bidding, nor that the contract be let to the lowest bidder, such contract need not be let to the lowest bidder, and where it is awarded to a higher bidder, a taxpayer cannot have the contract set aside where there is no proof of fraud.

Statutes — competitive bidding — municipal contracts.

3. Article 18, chap. 62, Laws of 1905 (art. 18, chap. 30, Political Code of 1905), which provides for competitive bidding and the prior estimate of probable cost in the case of certain municipal contracts, does not apply to municipal contracts for the erection of filtration plants and similar buildings.

Opinion filed February 1, 1913.

Appeal from the District Court for Cass county; *Pollock, J.*

Action to enjoin the city of Fargo and the city officials of said city from carrying out a contract for the erection of a water filtration plant for said city, on the ground of the illegality of said contract. Writ denied.

Affirmed.

The plaintiff has appealed from a judgment of the district court of Cass county, refusing to grant him injunctional relief, and asks for a trial *de novo* in this court. He sues as a taxpayer, and the prayer of his complaint is as follows: "That the defendant city of Fargo, the

Note.—For an extended note on the question of discretion in choosing between bidders for public contract, see 38 L.R.A.(N.S.) 653.

defendant V. R. Lovell, mayor of said city, E. R. Orchard, auditor of said city, and defendant C. H. Mitchell, treasurer of said city, and each and all of them, may be perpetually enjoined from certifying and selling the bonds of said city voted as in this complaint alleged, and applying the proceeds of said bonds, or any part thereof, to the payment of the cost of construction of said water filtration plant under the terms of said contract, and be enjoined from doing anything toward the construction and erection of said water filtration plant, and from in any manner carrying out with the defendant James Kennedy the contract hereinbefore described, and that the defendant James Kennedy be perpetually enjoined from further proceeding with the construction and erection of said water filtration plant; and for such other and further relief as in equity plaintiff may be entitled to."

The facts of the case are substantially as follows: On the 6th day of July, 1910, there was held in the city of Fargo a special election for the purpose of voting for waterworks bonds to aid in the construction of a filtration plant. At this election the following question was duly submitted to the voters of the city: "Shall the city of Fargo issue bonds in the sum of \$65,000, bearing interest at the rate of 5 per cent per annum, for the purpose of paying the cost of the machinery and materials for and the construction of a waterworks station and filtration plant, making the necessary connections with the present existing water mains and water plant, and installing therein the necessary pumps, machinery, appliances, and apparatus for the operating of the same, said plant and machinery to be used for the purpose of furnishing to the inhabitants of the city of Fargo a pure water supply, and for the purpose of fire protection for said city." This proposition was carried by a vote of 648 to 78. On the 28th day of March, 1911, at a special meeting of the said city council, the city engineer submitted plans and specifications for a mechanical filtration plant, which plans consisted of five sheets, numbered from 1 to 5, inclusive, and specifications for said proposed plants, consisting of eighty-nine pages; and said council passed a resolution to the effect "that the plans and specifications as submitted by the city engineer for a filtration plant be adopted and filed." At the same meeting the following motion was passed: "That the auditor be instructed to advertise for the construction of a filtration plant in accordance with the plans and specifications on file, bids to

be submitted on or before 5 o'clock p. m. on April 27, 1911." The plans and specifications of the city engineer, above referred to, however, were not accompanied by an estimate of the probable costs of construction, and the city council did not at any time approve by resolution an estimate of the probable cost of the plant described in said plans and specifications. On March 30, April 1, and April 5, 1911, the city auditor published in the official paper of the said city the following advertisement for bids:

Proposal for Bids.

Sealed proposals will be received until 5 o'clock p.m. of Thursday, April 27, 1911, for erecting and furnishing a complete water purification plant of 6,000,000 gallons daily capacity, 4,000,000 gallons daily capacity of which will be constructed at this time, including excavations, foundations, concrete masonry reservoirs, and filters and head house, together with mechanical equipment, and all piping and appurtenances complete ready for occupancy. The following are the approximate areas covered by the more important structures: Head house, 2,800 square feet; filters, 3,700 square feet; coagulating reservoirs, 15,000 square feet; clear water reservoirs, 3,700 square feet. The reservoirs are approximately from 12 to 20 feet down, mostly of reinforced concrete construction with concrete and brick with tile roof. Filters of reinforced concrete. Specifications and general plans may be obtained at the office of the city auditor of the city of Fargo after this date. A certified check on a Fargo, North Dakota, bank in the sum of 5 per cent of the amount of the proposal, deposited in accordance with the terms of the specifications, will be required of each bidder. A deposit of \$15 will be required for each set of plans and specifications given out, which will be refunded upon return of said sets in good condition. A surety company bond by a company doing business in the state of North Dakota for an amount equal to 50 per cent of the contract will be required of the successful bidder. The right is reserved to reject any and all bids.

(Signed) E. R. Orchard,
City auditor.

No further or other advertisement for bids was made. No bids appear to have been received prior to the 18th day of April, 1911. On the said 18th day of April, 1911, at an adjourned, regular meeting of the city council, a motion was carried "that the time for receiving bids for filtration plant, head house, pumping station, boilers, engines, etc., which was heretofore designated as April 27th, be extended to the 8th day of May, 1911, and that the city engineer be and is hereby directed to notify bidders of such extension of time." On the 27th day of April, 1911, at a meeting of the city council of said city, a motion was passed, authorizing the employment of Chas. B. Burdick, an expert engineer, and member of the firm of consulting engineers of Alvord & Burdick, of Chicago, Illinois, to aid the city council and the city engineer in determining which was the lowest bid for the construction and erection of said water filtration plant. On the 8th day of May, 1911, at an adjourned meeting of the city council, the bids of all bidders for the construction and erection of said plant were opened, and a motion was passed referring all of said bids to the city engineer, the expert consulting engineer, Chas. B. Burdick, and the members of the fire and water committee, to examine and report upon as to the merits and value of the respective bids on the night of May 12, 1911. The bids received were five in number, and were substantially as follows:

1. Pittsburg Filter Manufacturing Company, check accompanying same, \$6,500. Proposition No. 1 includes items 34-36-37-40-41-43; Prints 817-31-32-33-34-35-102-69-104-54-106-42-101-65, 138 72-391; 91-105; 55-89; 51-102; 67-107; 52-90-41; all complete for the sum of \$115,700.

Proposition No. 2, add to the above price \$1,600.

Proposition No. 3, add to the above price \$2,200.

Proposition No. 4, add to the above price \$520.

Proposition No. 6, deduct \$375.

Proposition No. 7, deduct \$300.

Proposition No. 8, deduct \$200.

Proposition No. 9, deduct \$450.

Proposition No. 10, deduct \$1,500.

2. Thomas F. Powers & Company, check accompanying same, \$6,-000. Thomas F. Powers, in conjunction with Pittsburg Filter Manufacturing Company, agree to erect plant complete for \$109,300.

3. S. Birch & Sons Construction Company, check accompanying same \$6,100. S. Birch & Sons Construction Company, bidding with Pittsburg Filter Manufacturing Company, agree to construct plant complete for \$118,000.

4. Bid of James Kennedy hereinafter set out in full.

5. Fargo Plumbing & Heating Company, checks \$6,000, \$750, \$600. Proposes to furnish all materials, perform all labor, as per engineer's specifications, and our list of exhibits does not include low lift pumps, in the sum of \$130,507. The above figures include the boilers, pumps, and stokers, as stated in bid No. 1, of poser equipment. If desired to take advantage of bids 2, 3, 4, and 5, the amounts may be added or deducted as stated therein.

Bid No. 1. Pumping Machinery.

1 Horizontal cross-compound high-duty, Corliss pumping engine, 4,-000,000 capacity.

3 150 H. P. water tube boilers and 3 chain grate stokers erected complete as per engineer's specifications,—all for the amount of \$22,-575.

Bid No. 2. Horizontal cross-compound high-duty Corliss pumping Engine, 4,000,000 capacity.

2 250 high duty water tube boilers and 2 chain grate stokers, all for the price of \$22,335.

Bid No. 3. 1 horizontal cross-compound high-duty Corliss pumping engine, capacity 4,000,000 gals., 3 150 horse power water tube boilers.

Three chain grate stokers, all for the price of \$22,447.

Bid No. 4. 1 horizontal cross-compound high-duty Corliss pumping engine, 4,000,000 gal. capacity; 2 250-horse power water tube boilers, built for a pressure of 185 lbs. 2 chain grate stokers for the price of \$21,393.

Bid No. 5. 1 horizontal cross-compound high-duty Corliss pumping engine, capacity 4,000,000.

3 150-horse power Heine water tube boilers with 3 150-horse power Jones stokers, total equipment, \$23,922.

The bid of James Kennedy, exclusive of the plans and specifications attached thereto, was as follows:

Fargo, N. D. May 8, 1911.

Hon. Mayor and City Council, City.

Gentlemen:—

I propose to furnish you a filter plant as per drawings F-862 to F-872 inclusive and F-875 to F-877 inclusive. E-660, 663, 670, 687, 692, 693, No. 3, R. 2456, also specifications No. 1224 for the sum of ninety-eight thousand nine hundred and sixty dollars. (\$98,960.)

If the sump, pump, and valves are installed same as shown on the drawing, add \$1,500. If I am to stand the cost of the test of the plant add \$1,500. If the air wash is not used, and a larger wash pump is used in place of the one specified, deduct \$1,150. If the sampling pumps on the filters, marble tables, and bowls are left out with sampling pumps, and sight tubes for the raw coagulated water and filter water are installed, deduct \$650. If iron hand rails are used in place of brass hand rails, deduct \$260. If Troy vertical engine is used in place of the steam turbines on wash pump, deduct \$480. If Earle controlling apparatus is used for the chemical feed, add \$2,000. If Earle rate controllers are used in filter bed, add \$1,680. If building for head house and substructure over filter is built the same as drawings No. 876 inclosed and special specifications, deduct \$4,000. If the Vivian controller as per No. 877 and No. 3 are used on the filters, deduct \$200.

The party furnishing me with the equipment plant is licensed in the Jewell down draft patent, and also holds other patents covering every detail of this plant as designed. I will furnish the city a bond, protecting it from any suit for infringement of any patent used in this plant, if the city so desires. Yours respectfully.

(Signed) James Kennedy.

There is some question as to whether the plans and specifications referred to in this bid, and which were drawn and submitted by Kennedy himself, complied in all particulars with those prepared by the city; and although the advertisement for bids and the contract provided generally that the building should be constructed according to the plans and specifications of the city, the specifications of Kennedy contained

the provision that "it is understood that wherever the drawings or specifications of James Kennedy conflict with those of the city engineer of the city of Fargo, North Dakota, the drawings and specifications of James Kennedy shall govern."

The plans and specifications prepared by the city engineer, referred to in the published proposal for bids, described a complete mechanical filtration plant of fixed dimensions, capacity, and material. The plans consisted of five sheets, and the specifications consisted of eighty-nine typewritten pages. The plans carefully described the dimensions of the buildings and chambers and the location of the apparatus. The specifications described the material, the details of said plant, the apparatus, and the function of the apparatus and appliances. As to a number of patented appliances, however, no particular patent was specified, but as to such appliances the city left the determination of the kind and make of appliances to be installed until after the bids had been received, and bidders were invited to bid upon any of the different kinds and makes of equipment and appliances upon the market and in use in the construction of water filtration plants, and were invited to submit plans and specifications thereof. After the submission of said bids the engineer and members of the committee to whom the same were referred reported to the city council that the bid of James Kennedy was the lowest and best bid for the construction of said plant, and the same was accepted and approved by the city council as the lowest and best bid, and said council by resolution accepted the said bid at the sum of ninety-six thousand two hundred and twenty dollars (\$96,220), and authorized the proper officers to execute a contract with said Kennedy in accordance therewith. Thereupon a contract with said Kennedy was prepared, submitted to and read to the city council, and spread upon the minutes of said body in full, except as to the date of execution thereof. On the 15th day of May, 1911, the said contract was executed and signed. The bid of the said Kennedy was not accompanied by a bond for the full amount of his bid, but upon the execution of the contract, the said Kennedy executed and delivered to the city a bond in the sum of \$50,000. Immediately upon the execution of the contract, the said Kennedy proceeded to carry out the same, and at the trial of the action had completed a substantial portion thereof; and the said city, for the purpose of making such purification

plant usable upon its completion, had let three separate contracts for connections, involving the expenditure of many thousands of dollars, and the work thereon had been partially completed.

No fraud in connection with the letting of the contract in question is alleged or claimed. Plaintiff is satisfied with complaining and alleging that the contract was illegally let, because: (1) The city council and its officers made no attempt to comply with the provisions of chapter 62, Laws of 1905. (2) No estimate of cost of the work to be done was made or filed by the city engineer or approved by the city council. (3) The plans and specifications filed by the city engineer were merely general plans and specifications, and were not such as permitted or required competitive bidding, and did not comply with the provisions of chapter 62, Laws of 1905. (4) The proposal for bids did not require and specify that the work should be done "according to the plans and specifications on file in the auditor's office." (5) The advertisement for bids wholly failed to specify the time within which the work was to be completed. (6) The advertisement for bids wholly failed to call for bids based on cash payments for said work. (7) The defendant Kennedy's bid was to do the work according to his own plans and specifications, and not according to the city's. (8) The defendant Kennedy's bid was not accompanied by a bidder's bond for the full amount of his bid, as provided by chapter 46, Laws of 1907, page 64. (9) No contract bond was ever executed for the full amount of the contract price, as required by chapter 46, Laws of 1907, page 65. (10) The contract bond which was executed did not contain the provisions required by chapter 46, Laws of 1907, page 65. (11) The contract finally entered into between the city and defendant Kennedy was made after private negotiations between the mayor, the city attorney, Kennedy, the consulting engineer, and the fire and water committee of the city council, covering a period of several days after the bids were opened, and before the contract was finally awarded to said Kennedy, and said contract was not to do the work either according to the plans and specifications filed by the city engineer, or according to the plans and specifications submitted by defendant Kennedy with his bid, and was not arrived at as a result of competitive bids. (12) The contract with the defendant Kennedy did not require the work to be done according to the city's plans and specifications, which were on file in

the city auditor's office as required by § 149, chap. 62, Laws of 1905, but required it to be done in part according to Kennedy's plans and specifications, and in part according to the city's, and in part according to the new provisions inserted in the contract, and in part according to the plans prepared by the city engineer and never submitted to the other bidders. (13) Kennedy's bid was not in fact the lowest bid.

The city defended on the grounds: (1) That the provisions of chapter 62, Laws of 1905, were not applicable to buildings of the kind under consideration. (2) That, though the contract for the filtration plant was made on May 15, 1911, a complaint notifying the city of the nature of plaintiff's action was not served until June 26, 1911, the action merely having been begun by service of summons, unaccompanied by a complaint, on May 31, 1911; and no temporary restraining order having been applied for, and the contractor having been allowed to proceed with the work so that the same has now been practically completed, although not fully paid for, and the city having made large extensions of mains and pipes to connect therewith, and the city filtration plant and water supply being necessary to the general health and convenience of the city, the plaintiff is now estopped from proceeding in the action. Defendants also contend that the contract was in part let to the lowest bidder; that the bids were, in every essential, competitive. Defendants, however, admit that no prior estimate of probable cost was made.

Stambaugh & Fowler, for appellant.

The statute regulating the manner of letting contracts for public work by cities, applies to and governs the building of a water filtration plant. Constitution, §§ 183, 130; *Stern v. Fargo*, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403; *Ft. Scott v. W. G. Eads Brokerage Co.* 54 C. C. A. 437, 117 Fed. 51; *Platter v. Elkhart County*, 103 Ind. 360, 2 N. E. 544; *Moss v. Fairbury*, 66 Neb. 671, 92 N. W. 722.

Municipalities have such powers only, as are expressed in their charters. 28 Cyc. 274.

The city of Fargo is governed by, and operating under the provisions of Chapter 62 of the Laws of 1905, which is its charter. *State ex rel. Mitchell v. Mayo*, 15 N. D. 327, 108 N. W. 36.

The city must strictly comply with all requirements and restrictions contained in charter. *Laws 1905, chap. 62, secs. 142-149.*

The entire statute and its general subject matter must be considered, in construing it. *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 83, 49 N. W. 318; *Grigsby v. Minnehaha County*, 6 S. D. 492, 62 N. W. 106; *Stern v. Fargo*, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 408.

Courts must harmonize the various provisions of a statute, so far as possible, to give effect to legislative intent. *First Nat. Bank v. Lewis*, 18 N. D. 393, 121 N. W. 836; *Minot v. Amundson*, 22 N. D. 236, 133 N. W. 551; *Fremont, E. & M. Valley R. Co. v. Pennington County*, 20 S. D. 270, 105 N. W. 929; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705; *State ex rel. Flaherty v. Hanson*, 16 N. D. 348, 113 N. W. 371; *Saunders v. Iowa City*, 134 Iowa, 132. 9 L.R.A.(N.S.) 392, 111 N. W. 531; *McQuiddy v. Brannock*, 70 Mo. App. 535.

The mere numbering of the sections of an act is immaterial. *Re Bull*, 153 Cal. 715, 96 Pac. 366.

The statute requires competition in bids. *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; *State ex rel. Dunn v. Barlow*, 48 Mo. 17; *Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693; *American Pavement Co. v. Wagner*, 139 Pa. 623, 21 Atl. 160; *Trenton v. Shaw*, 49 N. J. L. 638, 10 Atl. 273.

Statute is not limited to special improvements. *State ex rel. Dunn v. Barlow*, 48 Mo. 22; *State ex rel. Purcell v. Anderson*, 18 N. D. 147, 118 N. W. 29; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29; *LeTourneau v. Hugo*, 90 Minn. 420, 97 N. W. 115.

Contract, if not let by competitive bids, is null and void. Plaintiff—a taxpayer—can maintain this suit. *Engstad v. Dinnie*, 8 N. D. 11, 76 N. W. 292; *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Fox v. Walley*, 13 N. D. 611, 102 N. W. 161; 2 High, Inj. 1263; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 611.

This is in effect a suit by the public; laches is no bar, even if existing. *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161; *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; 2 High, Inj. 1260; *Manly Bldg. Co. v. Newton*, 114 Ga. 245, 40 S. E. 278; *McLauren v. Grand Forks*, 6 Dak. 397,

24 N. D.—29.

43 N. W. 710; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90; *Ricketson v. Milwaukee*, 105 Wis. 591, 47 L.R.A. 685, 81 N. W. 864; *Platter v. Elkhart County*, 103 Ind. 360, 2 N. E. 544; *Forsyth County v. Gwinnett County*, 108 Ga. 510, 33 S. E. 892; 28 Cyc. 1025, and cases cited. *Broderick v. St. Paul*, 90 Minn. 443, 97 N. W. 118.

The public notice for bids must strictly comply with the statute. *Platter v. Elkhart County*, 103 Ind. 360, 2 N. E. 544; *Windsor v. Des Moines*, 101 Iowa, 343, 70 N. W. 214; *Bennett v. Emmetsburg*, 138 Iowa, 67, 115 N. W. 582.

Contract must be awarded to lowest competitive bidder. Section 148 of act; *Hannan v. Board of Education*, 25 Okla. 372, 30 L.R.A. (N.S.) 214, 107 Pac. 646; 2 Dill. Mun. Corp. § 807; *Diamond v. Mankato*, 89 Minn. 48, 61 L.R.A. 448, 93 N. W. 912; *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645, 13 L.R.A. 353, 17 S. W. 7; *Atty. Gen. ex rel. Cook v. Detroit*, 26 Mich. 263; *Nash v. St. Paul*, 11 Minn. 174, Gil. 110.

Plans and specifications for such work are necessary. *Huntington County v. Pashong*, 41 Ind. App. 69, 83 N. E. 383; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 611; *Hannan v. Board of Education*, 25 Okla. 372, 30 L.R.A. (N.S.) 214, 107 Pac. 646; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29; *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1; *State ex rel. Clark v. Douglas County*, 11 Neb. 484, 9 N. W. 691.

City council has no power to permit one bid to be amended, so as to make it better than another. *Wickwire v. Elkhart*, 144 Ind. 305, 43 N. E. 216; *Frame v. Felix*, 167 Pa. 47, 27 L.R.A. 802, 31 Atl. 375; *Moss v. Fairbury*, 66 Neb. 671, 92 N. W. 721; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32; *Andrews v. Ada County*, 7 Idaho, 453, 63 Pac. 592; *Sanitary Dist. v. Lee*, 79 Ill. App. 169; *Manly Bldg. Co. v. Newton*, 114 Ga. 245, 40 S. E. 274; *Piedmont Paving Co. v. Allman*, 136 Cal. 88, 68 Pac. 493; *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927; *McBrian v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206; *Ely v. Grand Rapids*, 84 Mich. 336, 47 N. W. 447; *Brady v. New York*, 20 N. Y. 312; *Kneeland v. Milwaukee*, 18 Wis. 412; *Wells v. Burnham*, 20 Wis. 113; *Ricketson v. Milwaukee*, 105 Wis. 591, 47 L.R.A. 685, 81 N. W. 864.

Evidence of patented articles to be used, is incompetent. 1905

Code, § 7308, ¶ 8; U. S. Rev. Stat. Sec. 892, U. S. Comp. Stat, 1901, p. 673; *Paine v. Trask*, 5 C. C. A. 497, 5 U. S. App. 283, 56 Fed. 233.

The contract in this suit is null and void. *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 611; *Ricketson v. Milwaukee*, 105 Wis. 591, 47 L.R.A. 685, 81 N. W. 864; *Frederick v. Douglass County*, 96 Wis. 411, 71 N. W. 798; *Mueller v. Eau Claire County*, 108 Wis. 304, 84 N. W. 430; *City Improv. Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776; *McCloud v. Columbus*, 54 Ohio St. 439, 44 N. E. 95; *Addis v. Pittsburgh*, 85 Pa. 379; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *State, McDermott, Prosecutor, v. Jersey City Street & Water Comrs.* 56 N. J. L. 273, 28 Atl. 424; *Brady v. New York*, 20 N. Y. 312; *Richmond County v. Ellis*, 59 N. Y. 620; *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Lyddy v. Long Island City*, 104 N. Y. 218, 10 N. E. 155; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4.

Judgment for restoration of money paid should be rendered. *Webster v. Douglas County*, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885, 78 N. W. 451; *Egaard v. Dahlke*, 109 Wis. 366, 85 N. W. 369; Rev. Codes 1905, Sec. 7229; *Buckingham v. Flummerfelt*, 15 N. D. 112, 106 N. W. 403.

Ball, Watson, Young, & Lawrence, Emerson H. Smith, City Attorney, and V. R. Lovell, for respondents.

Assignments of error must be specific, and must be made in compliance with the rules of court, or they will be deemed abandoned. *Hos-tetter v. Brooks Elevator Co.* 4 N. D. 357, 61 N. W. 49; *O'Brien v. Miller*, 4 N. D. 308, 60 N. W. 841; *Globe Invest. Co. v. Boyum*, 3 N. D. 538, 58 N. W. 339; *Thompson v. Cunningham*, 6 N. D. 426, 71 N. W. 128; *Brnjolfson v. Thingvalla Twp.* 8 N. D. 106, 77 N. W. 284; *Deindorfer v. Bachmore*, 12 S. D. 285, 81 N. W. 297.

This case cannot be reviewed or retried. *Griffith v. Walworth County*, 20 S. D. 142, 104 N. W. 1117; *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667; *Brynjolfson v. Thingvalla Twp.* 8 N. D. 106, 77 N. W. 284; *Wilson v. Kartes*, 11 N. D. 92, 88 N. W. 1023; *State v. Wright*, 20 N. D. 216, 126 N. W. 1023, Ann. Cas. 1912 C,

795; *Marck v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 86, 105 N. W. 1106; *Buckingham v. Flummerfelt*, 15 N. D. 112, 106 N. W. 403.

Questions of fact, for review, must be specific, and clearly presented, and must not be mere legal questions. *Douglas v. Richards*, 10 N. D. 366, 87 N. W. 600; *Salemonson v. Thompson*, 13 N. D. 190, 101 N. W. 321.

Where acts sought to be enjoined and restrained are performed pending an appeal, judgment reversing the trial court improper and of no avail. *Chicago, M. & St. P. R. Co. v. Sioux Falls*, 28 S. D. 471, 134 N. W. 46; *Wingert v. First Nat. Bank*, 223 U. S. 670, 56 L. ed. 605, 32 Sup. Ct. Rep. 391.

The relief sought by plaintiff is inequitable. The interests of the public are paramount to the interests of the individual, and a taxpayer cannot use the processes of the court to do an injustice to the public. *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385; *State ex rel. Madderson v. Noble*, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141; *Erickson v. Cass County*, 11 N. D. 509, 92 N. W. 841; *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586; *High, Inj.* 9; *Sheldon v. Rockwell*, 9 Wis. 168, 76 Am. Dec. 265; 6 U. S. Dig.; *Warden v. Fond du Lac County*, 14 Wis. 618; *Pettibone v. La Crosse & M. R. Co.* 14 Wis. 443; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530.

Injunction will not be granted when injury complained of is slight, compared to the inconvenience to the defendant and the public. *Higbee v. Camden & A. R. Co.* 20 N. J. Eq. 435; *Kneeland v. Milwaukee*, 15 Wis. 455; *Wheeler v. Rice*, 83 Pa. 232; *Logansport v. Uhl*, 99 Ind. 539, 50 Am. Rep. 109; *McGuire v. Rapid City*, 6 Dak. 346, 5 L.R.A. 752, 43 N. W. 706; *National Tube-Works Co. v. Chamberlain*, 5 Dak. 54, 37 N. W. 761; *Wren v. Indianapolis*, 96 Ind. 218; *Frick v. Brinkley*, 61 Ark. 397, 33 S. W. 527; *Moore v. New York*, 73 N. Y. 238, 29 Am. Rep. 134; *McCullough v. Denver*, 39 Fed. 307; *Scharr v. Camden*. — N. J. Eq. —, 49 Atl. 817; *Tash v. Adams*, 10 Cush. 252.

In the absence of fraud, though contract may be void, injunction will not lie. *Brasher v. Miller*, 114 Ala. 485, 20 So. 467; *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487; *Ebert v. Langlade County*, 107 Wis. 569, 83 N. W. 942; *Farmer v. St. Paul*, 65 Minn. 176, 33 L.R.A. 199,

67 N. W. 990; *Delaware Bridge Co. v. Trenton City Bridge Co.* 13 N. J. Eq. 46.

Injunction will not be granted where it would cause great injury to the public, without corresponding advantage to the complainant. *Torrey v. Camden & A. R. Co.* 18 N. J. Eq. 293; *Higbee v. Camden & A. R. Co.* 20 N. J. Eq. 435; *Easton v. New York & L. B. R. Co.* 24 N. J. Eq. 58; *Traphagen v. Atty. Gen. ex rel. Jersey City*, 29 N. J. Eq. 206.

In important public work, courts will not use their prohibitory power unless it is the only means to secure adequate redress. *Traphagen v. Jersey City*, *supra*; *State, Youngster, Prosecutor v. Paterson*, 40 N. G. L. 244; *State, Rettinger, Prosecutor, v. Passaic*, 45 N. J. L. 146.

The city, through its authorities, has ratified the contract, has received its benefits, and cannot contest its liability. *Argenti v. San Francisco*, 16 Cal. 256; *People v. Swift*, 31 Cal. 26; *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 526; 1 Dill. Mun. Corp. § 463, and notes; *Bruce v. Dickey*, 116 Ill. 527, 6 N. E. 435; *Pennsylvania v. Hays*, 93 Pa. 72; *Marshall County v. Schenck*, 5 Wall. 772, 18 L. ed. 556; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *Re Millvale*, 162 Pa. 374, 29 Atl. 641, 644.

The city had power to let, make, and enforce a contract for the erection of a filtration plant. Const. Secs. 130-183; Cal. Code, 1905. sec. 2678.

City may exercise powers incident and essential to the carrying out of powers granted. *Mayo v. Dover & F. V. Fire Co.* 96 Me. 539, 53 Atl. 62; *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *Vaughn v. Greencastle*, 104 Mo. App. 206, 78 S. W. 50; *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996, 95 N. W. 94; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *Scott v. Laporte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; *Groner v. Portsmouth*, 77 Va. 488.

A municipal contract made without competitive bids, etc., is valid, unless statute, charter, or ordinance prescribes otherwise. 28 Cyc. 657, 1025-1026; *Crowder v. Sullivan*, 128 Ind. 486, 13 L.R.A. 647, 28 N. E. 94; *Yarnold v. Lawrence*, 15 Kan. 126; *Elliot v. Minneapolis*, 59 Minn. 111, 60 N. W. 1081; *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651; *Trenton v. Shaw*, 49 N. J. L. 638, 10 Atl. 273; *Kingsley v. Brooklyn*, 78 N. Y. 200, 7 Abb. N. C. 28, 5 Abb. N. C. 1.

There is no statute in this state requiring cities to file plans and specifications, advertise for bids, etc., in building a filtration plant. *Laws* 1905, chap. 62; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Simonds v. Powers*, 28 Vt. 354; *Jones v. State*, 1 Kan. 273; *Griffith v. Carter*, 8 Kan. 565; *Opinion of Justices*, 22 Pick. 571; *Re Kilby Bank*, 23 Pick. 93; *Atty. Gen. v. Bank of Michigan*, Harr. Ch. (Mich.) 315; *Thorpe v. Schooling*, 7 Nev. 15.

Statutes must be construed so as to carry out the intention of the legislature, though such construction may seem contrary to the letter of the statute. *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *United States v. Buchanan*, 4 Hughes, 487, 9 Fed. 689; *Kennedy v. Kennedy*, 2 Ala. 571; *Wilson v. Biscoe*, 11 Ark. 55; *Erwin v. Moore*, 15 Ga. 361; *Chandler v. Lee*, 1 Idaho, 349; *Perry County v. Jefferson County*, 94 Ill. 214; *Wabash, St. L. & P. R. Co. v. Binkert*, 106 Ill. 298; *Dubuque v. Dubuque*, 7 Iowa, 262; *Bailey v. Com.* 11 Bush, 688; *Cox v. Williams*, 5 Mart. N. S. 141; *Buhol v. Boudousquie*, 8 Mart. N. S. 425; *Ardry v. Ardry*, 16 La. 264; *Somerset v. Dighton*, 12 Mass. 383; *Staniels v. Raymond*, 4 Cush. 314; *Grimes v. Bryne*, 2 Minn. 89, Gil. 72; *Barker v. Kelderhouse*, 8 Minn. 207, Gil. 178; *Ingraham v. Speed*, 30 Miss. 410; *Riddick v. The Governor*, 1 Mo. 147; *State ex rel. Missouri Mut. L. Ins. Co. v. King*, 44 Mo. 283; *Kane v. Kansas City, Ft. S. & M. R. Co.* 112 Mo. 34, 20 S. W. 532; *Sargent v. Union School Dist.* 63 N. H. 528, 2 Atl. 641; *Brown v. Wright*, 13 N. J. L. 240; *Jersey Co. v. Davison*, 29 N. J. L. 415; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Crocker v. Crane*, 21 Wend. 211, 34 Am. Dec. 228; *Smith v. People*, 47 N. Y. 330.

Courts may declare that matters within the letter of the statute are not governed by the statute because not within its spirit. *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

The words of a statute may be enlarged or limited, to bring the act within the legislative intention. *Maxwell v. Collins*, 8 Ind. 38; *Miller v. State*, 106 Ind. 415, 7 N. E. 209; *Gray v. Cumberland County*, 83 Me. 429, 22 Atl. 376; *Mendon v. Worcester County*, 10 Pick. 235; *Com. v. Cambridge*, 20 Pick. 267; *Farmers' Bank v. Hale*, 59 N. Y. 53; *Territory ex rel. Sampson v. Clark*, 2 Okla. 82, 35 Pac. 882;

State ex rel. Dolan v. Clarksville & R. Turnp. Co. 2 Sneed, 88; Ryegate v. Wardsboro, 30 Vt. 746; Cardinel v. Smith, Deady, 197, Fed. Cas. No. 2,395; United States v. Athens Armory, 35 Ga. 344, Fed. Cas. No. 14,473; Magruder v. Carroll, 4 Md. 335; Catlin v. Hull, 21 Vt. 152; San Francisco v. Hasen, 5 Cal. 169; Sams v. King, 18 Fla. 557; Noble v. State, 1 G. Greene, 325; Vermont Loan & T. Co. v. Whithed, 2 N. D. 83, 49 N. W. 318.

Many cases not expressly named may be comprehended within the equity and true intent of the statute. Whitney v. Whitney, 14 Mass. 92; Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408; Reiche v. Smythe, 13 Wall. 162, 20 L. ed. 566; Atkins v. Fibre Disintegrating Co. 18 Wall. 302, 21 L. ed. 844; People ex rel. Mason v. McClave, 99 N. Y. 83, 1 N. E. 235; Torrance v. McDougald, 12 Ga. 526; Mason v. Finch, 3 Ill. 223; Burke v. Monroe County, 77 Ill. 610; Territory ex rel. Sampson v. Clark, 2 Okla. 82, 35 Pac. 883; Palms v. Shawano County, 61 Wis. 211, 21 N. W. 77; Bingham v. Birmingham, 103 Mo. 345, 15 S. W. 533; Lee v. Roberts, 3 Okla. 106, 41 Pac. 595; Pond v. Maddox, 38 Cal. 572; Storms v. Stevens, 104 Ind. 46, 3 N. E. 401; Re Bulger, 45 Cal. 553; Lancaster County v. Frey, 128 Pa. 593, 18 Atl. 478; Chambers v. State, 25 Tex. 307; Hearn v. State, 25 Tex. 336; Deposit Bank v. Daviess County, 102 Ky. 174, 44 L.R.A. 833, 39 S. W. 1030, 44 S. W. 1131; Rawls v. Doe, 23 Ala. 240, 58 Am. Dec. 290; Moran v. Thompson, 20 Wash. 525, 56 Pac. 29.

BRUCE, J. (after stating the facts as above). It is well established that, in the absence of charter or statutory requirement, municipal contracts need not be let under competitive bidding. In such cases the corporate authorities are only required to act in good faith and to the best interests of the municipality. McQuillin, Mun. Corp. § 1186, p. 2634; Elliott v. Minneapolis, 59 Minn. 111, 60 N. W. 1081; Middle Valley Trap Rock & Min. Co. v. Morris County, 70 N. J. L. 625, 57 Atl. 258, affirmed in 71 N. J. L. 333, 60 Atl. 358; Yarnold v. Lawrence, 15 Kan. 126; Augusta v. McKibben, 22 Ky. L. Rep. 1224, 60 S. W. 291; Dillingham v. Spartanburg, 75 S. C. 549, 8 L.R.A.(N.S.) 412, 117 Am. St. Rep. 917, 56 S. E. 381, 9 Ann. Cas. 829; State, Scheffbauer, Prosecutor, v. Kearney Twp. 57 N. J. L. 588, 31 Atl. 454; Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702. In the case at bar

there is no proof or serious allegation of any fraud or lack of good faith on the part of the municipal authorities. The proof, too, is conclusive that the filtration plant in question is a matter of great public utility, and one which is seriously and urgently needed. Where bids are requested, but there is no law requiring competitive bidding, nor that the contract shall be let to the lowest bidder, such contract need not be let to the lowest bidder, and where it is awarded to a higher bidder, a taxpayer cannot have the contract set aside where there is no proof of fraud. *McQuillin, Mun. Corp.* ¶ 1228, p. 2691; *Reihl v. San Jose*, 101 Cal. 442, 35 Pac. 1013.

The all-important question for discussion, then, is whether article 18 of chapter 62 of the Laws of 1905 (art. 18, chapter 30, of the Political Code of 1905), has any application whatever to municipal improvements of the nature of that under consideration; that is to say, of municipal improvements which are of general use and utility, and which are maintained for the general purposes of government, or of preserving and protecting the public health and safety, which are not of any particular benefit to any particular property or any particular persons, as distinguished from the public as a whole, and which therefore can and should be paid for out of the public revenues and the public taxes levied upon the people as a whole, and not merely out of the funds which may be derived from assessments based upon special benefits conferred. We think it is quite clear that the provisions of the article in question have no such application. The title of the act is "An Act for the Organization and Government of Cities, and to Provide for the Limitation of Actions to *Vacate Special Assessments* heretofore Made." It re-enacts, it is true, the general provisions of the prior statute which relate to the general powers of cities, but it is quite clear that its main and special purpose is to provide for a more complete and comprehensive scheme in regard to what are generally known as special or local improvements, the expenses of which are met by special assessments upon the property benefited. In addition to the general powers, which are usually given to cities and in regard to which the act, in the main, merely re-enacts the provisions of chapter 28 of the Code of 1899, the power is given to make many other improvements by means of what are commonly termed special assessments. That is to say, to construct pavements, sewers, sidewalks, and other improvements

which, though in a measure of public value, are also of a special value to the owners of the adjacent property, and in such case to provide for the payment of the expenses of such by levying an assessment upon the persons benefited thereby. The act nowhere makes any provision for the erection and construction of filtration plants and other similar buildings by special assessments. It does, it is true, provide in § 163 of article 18 for the payment of one fifth of the cost "of any work heretofore provided for other than sidewalks and opening and widening of streets by general taxation of all taxable property in said city." Such clause, however, clearly relates to the improvements mentioned in article 18, in which § 163 is contained, namely, sewers, paving, and water mains; for not merely is this to us made clear by the context, but there is nowhere in the act any provision for the erection or construction of general pumping stations, jails, courthouses, or filtration plants, and which, as we have before said, are general, and not special, in the benefits which they confer, by special assessments or by any other means than by general taxation. It is to be noticed, indeed, that § 149 contained in art. 18, which article by the terms of its title, relates to sewers, paving, and water mains alone, and which, with article 17, are the only articles which relate to special assessments and to what may be termed local improvements, expressly provides that "each contract so entered into shall state the time on or before which such work must be completed, and must state from what fund the amount to be paid thereon by the city is to be paid, and that the consideration of such contract is payable only in warrants drawn *on such fund*, and that such city *assumes and incurs no general liability* under such contract." Such provision and such article must clearly and solely relate to what are generally known as local or special improvements. For nowhere else is there any limitation on a city from contracting generally for its buildings and improvements, and assuming a general liability therefor, provided that the indebtedness therein created is within its constitutional debt limit, and, in case bonds are issued, a proper sinking fund and tax levy is provided for. We are clearly, therefore, of the opinion that § 142 of article 18, and which provides as a prerequisite to the construction or the letting of a contract, that the city engineer shall file plans and specifications for such construction work, together with details of the work to be done, and an estimate of its

probable cost, relates merely to the "construction or operation of sewers, to the opening, widening, and extending, paving, repaving, macadamizing, or curbing of any street, avenue, lane, highway, or other public grounds within the city limits, or to extending, relaying, and replacing any water mains, as such are the only improvements specified in the paragraph," or, as a matter of fact, in the article itself. The same, we believe, is also true of §§ 145, 146, 147, 148, and 149, which relate to the advertising for bids, the nature of the bids themselves, the bonds required to be given, and the contracts to be made thereunder. We are, in fact, led to the irresistible conclusion that art. 18 of chapter 62 of the Laws of 1905 relates merely, as it expressly states in its subtitle, to sewers, paving, and water mains, or, at any rate, to those improvements which are generally made and can be made by means of special assessments.

Another persuasive reason for holding that the provisions of article 18 of chapter 62 of the Laws of 1905, and the provisions for competitive bidding therein contained, relate merely to contracts for sewers, paving, and water mains, that is to say, to the local improvements provided for and treated of in such article, is to be found in the fact that the legislature of 1907 amended by paragraph 7 of chapter 46 of the Laws of 1907, § 148 of such article, that is to say, § 2783 of the Laws of 1905, in various particulars, and in such amendment used the word "article," and not "act." "The city council," the amended section reads, "shall have the right to reject any and all bids for work to be done under this *article*," etc. This is contemporaneous construction of the highest order and of the highest significance. The purpose of the amendment was to provide that if the first bid was rejected the contract should be let not to the lowest, but to the lowest responsible bidder, and no particular point seems to be made of the word "article." It seems, however, to have been taken for granted that the word "act" in the original bill, that is to say, in § 148, art. 18, Laws of 1905, was used in the sense of *article*. If, indeed, such a construction is not given, and competitive bids are required in regard to all contracts let by the city, whether for paving, sewerage mains, or anything else, then it is only in the case of bids for paving, sewerage, and water mains, that is to say, the special improvements mentioned in article 18, Laws of 1905, that such bids may be rejected. In all other cases, if such

construction is adhered to, the city would be bound absolutely to accept the first bids, provided they were the lowest, whether, in its mature deliberation and judgment, it thought it desirable or not so to do. This, in an age of growing invention and rapidly expanding scientific knowledge. In the case of a filtration plant where scientific knowledge and accuracy, and the correlation and co-ordination of scientific devices is especially necessary, such a situation is too dangerous for us to believe that it was ever intended.

It is immaterial whether the legislature intended that the word "act" should be used in its strict and usual sense, or as a synonym for the word "article." Even if we concede the strict and usual meaning, the intent of the legislature is just as clear. Where, indeed, in the whole of the act, is there to be found any idea, suggestion, or requirement that estimates of probable cost and competitive bids should be made or required in the case of buildings such as filtration plants? And this even though we write the word "act" in big letters. The only sections which relate to bids or estimate of costs are § 132, which provides that "the city auditor shall, on or before the 15th day of March in each year, advertise in the official newspaper of the city twice, once in each week for two consecutive weeks, for bids for the construction of the various kinds of *sidewalks* in the city during the ensuing year, in accordance with the specifications of the ordinance provided for in § . . . [130 of this act], and such bid shall be received and opened, and, if accompanied by a check and bond as hereinafter provided, such contract shall be awarded to the lowest bidder, at the regular meeting of the city council in April, and contracts may be awarded to different bidders for the different kinds of *sidewalks* required." This section certainly cannot be made to refer to anything but sidewalks. Section 142 provides: "When the city council shall deem it necessary to construct or alter any sewer, or to open, widen, extend, pave, repave, macadamize, or curb *any street, alley, avenue, lane, highway, or other public grounds* within the city limits, or to extend, relay, or replace *any water mains*, the city council shall direct the city engineer, or in case the city has no competent city engineer, shall employ a competent engineer to prepare plans and specifications for *such work*, including the grading of the street if not already established, and all details of the work to be done, and make an estimate of its probable cost, which

plans, specifications, and estimates shall be approved by resolution of the city council, which approval shall be deemed to establish the grade of the street as shown in such plans and specifications, if the grade of the street has not previously been established by ordinance. In case the improvement shall consist in *paving* or *repaving* any street, alley, or public place, the city council may require such plans, specifications, and estimates to be made of such different kinds of pavement as they may deem advisable. Such plans, specifications, and estimates shall be the property of the city, and be filed in the office of the city auditor, and remain on file in his office subject to the inspection of all persons." Where is there in this section any reference to anything but *sewers*, *pavements*, *macadamizing*, *curbing* or the extension and building and replacing of *water mains*? Section 143 provides: "After the plans, specifications, and estimates mentioned in the preceding section shall have been filed in the office of the city auditor, and approved as provided in the *preceding* section, the city council shall by resolution declare *such* work or improvement (except the construction or alteration of sewers) necessary to be done according to such plans and specifications, as filed in the office of the city auditor; and in case of paving, such resolution shall designate the kind of pavement proposed to be constructed, and refer intelligently to the plans, specifications, and estimates therefor; which resolution shall be published twice, once in each week for two consecutive weeks in the official newspaper of the city, and if a majority of the owners of property, liable to be specially assessed therefor, shall not, within thirty-five days after the first publication of such resolution, file with the city auditor a written protest against such improvement, then the city council shall have power to cause such improvement to be made according to such plans and specifications, and to contract therefor, and to levy and collect assessments as hereinafter provided, and all such work shall be let by contract to the lowest bidder therefor." And § 145 provides (for § 144 merely provides for further proceedings in case of a protest, and is unimportant) that "the city council shall *then* cause proposals for *said* work to be advertised for in the official paper of such city, twice, once in each week for two successive weeks, which advertisement shall specify the work to be done, according to the plans and specifications therefor on file in the auditor's office, and shall call for bids therefor upon a basis

of cash payment for *said work*, and state the time within which such bids will be received, and within which *such work* is to be completed. Bids for *such work* shall be forwarded to the city auditor of such city, securely sealed, so as to prevent their being opened without detection, and shall have indorsed upon the outside thereof a statement of what work such proposals are for. Such bids shall be opened by the city council at the expiration of the time limited," etc. Where is there, in these provisions, any reference to anything else except *sewers, paving, macadamizing, and curbing*? Section 146 provides that "each bid for any work to be done under the provisions of this article shall be accompanied by a certified check, in case of sidewalks for the sum of \$50, and in the case of other work for the sum of \$500." This provision cannot possibly be applicable. The amount is absurdly inadequate. In the case at bar a check for \$6,000 was deposited.

The same is true of § 147, which requires that "each bid for any *such work* shall also be accompanied by a bond running to the city," etc. The only other provision is § 149, which provides that "all contracts entered into for any work provided for in this article shall be entered into in the name of the city, and shall be executed on the part of the city, by the mayor thereof, and countersigned by the auditor, with the corporate seal of the city affixed, and when signed by the contractor shall be filed in the office of the city auditor. Such contract shall require the work to be done thereunder to be done pursuant to the plans and specifications therefor on file in the office of the city auditor. . . . Each contract so entered into shall state the time on or before which such work must be completed, and *must state from what fund the amount to be paid thereon by the city is to be paid, and that the consideration of such contract is payable only in warrants drawn on such fund, and that such city assumes and incurs no general liability under such contract.*" This provision was clearly not intended to apply to contracts of the nature before us. Nowhere in the act is there any provision for paying for such buildings by means of a special assessment. Nowhere is there *any provision for any fund*, and nowhere is there any provision that in such cases the *city cannot be held to assume and incur any general liability*. The section in question, indeed, must relate solely to improvements which are to be paid for by means of special assessments. This is made clear by § 151, which follows,

and which provides, among other things, that "*all special assessments levied under the provisions of this act shall constitute a fund for the payment of the cost of the improvement,*" etc.

Article 18, Laws of 1899, which was repealed by the present act and for which the present act was practically substituted, itself contained no provision to the effect that waterworks should be built by any system of competitive bidding. It is true it provided (§ 2312) for a special assessment of adjacent property in certain instances, but even then there was no provision for such competitive contracts. The present act repeals § 2312, and there seems to be no provision for even the payment of a portion of such waterworks by special assessment. What the present act really accomplishes is to group and make uniform the special assessment systems in regard to *sewers, paving, and water mains*, and bids and contracts in relation thereto, all of which, in chapter 28, Laws of 1899, were treated of in separate and distinct articles, and had their own peculiar provisions. There appears, indeed, never to have been any time when filtration plants and works of such nature were required to be built by contracts let by a system of competitive bidding, and, as we have before said, even under the old statutes, when a portion thereof seems to have been permitted to be paid for by special assessments, there seem to have been no mandatory provisions for the letting of the contracts on such basis, competitive bidding being only required in cases of sewerage and paving. (See chapter 28, Laws of 1899.)

We realize fully that it has generally been the policy of this state to require that all public contracts shall be let by competition. We realize that competition is generally required in the case of townships (§ 307), in the case of counties (§ 2421), in the case of school districts (§ 909), and even by chapter 62 itself, in ¶ 73, § 47, in the case of "paper, printing, stationery, blanks, fuel, and all supplies needed for the use of the city." These special enumerations, however, which do not include buildings of the class or nature under consideration, are under the familiar rule of "*expressio unius est exclusio alterius*," argue against, rather than for, the requirement in this particular case. We may be personally of the belief that to require such bids generally, and in the case of all municipal contracts, would be sound public policy. This personal opinion of ours, however, even though honestly en-

tertained, does not justify us in judicially legislating and in requiring what the legislature has not required. This should be especially so in the case at bar, where such a judicial requirement would perhaps result in depriving a city of 15,000 inhabitants of a much-needed filtration plant, in endangering the public health, and in subjecting public officials who are responsible for the contract and against whom no charge of fraud or dishonesty has been made or imputed, to a possible action for damages. This is a court of equity, and not a legislative body. If the statute needs amendment, it is for the legislature, and not for us, to provide the remedy.

This view of the case makes it unnecessary to consider the other propositions advanced, which are all dependent upon it.

The judgment of the District Court is affirmed.

**WELCH v. FARGO & MOORHEAD STREET RAILWAY
COMPANY, a Corporation.**

(140 N. W. 680.)

Conflict in evidence — negligence — contributory negligence — question for jury — special verdict — ultimate facts.

1. Where there is a substantial conflict in the evidence, negligence and contributory negligence are ultimate questions of fact for the jury, and not of law for the court. Where, therefore, a special verdict is submitted in a personal injury case, it is not only proper, but necessary, that questions involving such ultimate facts should be submitted and answered.

Sufficiency of evidence to sustain findings.

2. Evidence examined and held to support findings of jury and the judgment of the court.

On Petition for Rehearing.

Negligence — contributory negligence — last clear chance — pleading.

3. The doctrine of discovered peril, or of the last clear chance, may be urged under a general allegation of negligence.

Negligence — contributory negligence — last clear chance — presumptions — street railways.

4. Where a hack driver was driving within a short distance of and parallel

to the street railway track, and within the track of the car, though not of the rail, and was overtaken and run down by a rapidly approaching car, which sounded no gong and gave no warning of its approach, and the evidence showed that though he started to turn across the track of said railway just before the accident, he would have been run down whether he had so turned or not, and that the motorman could have seen him during all of the time he was on said street and in the track of said car, and that when first turning upon said street and while about 480 feet from the scene of the accident, he turned to look back for an approaching car and saw none, but did not look again, though he listened for approaching cars, *held*, that the court will not presume contributory negligence as a matter of law, and that in such a case the doctrine of the last clear chance will be held to apply.

Opinion filed February 1, 1913. On petition for rehearing March 7, 1913.

Appeal from the District Court for Cass County; *Pollock, J.*

Action to recover damages for personal injuries received by reason of the alleged negligence of defendant. Verdict and judgment for the plaintiff. Defendant appeals.

Affirmed.

This is an appeal from an order denying appellant's and defendant's motion for judgment notwithstanding the verdict, or for a new trial, and also from the judgment entered herein in favor of the respondent. It is a personal injury case. The plaintiff and respondent was a hack driver in the city of Fargo, and had been such for a number of years. He was familiar with the appellant's system of street cars and was an experienced driver. On the day of the accident he delivered a passenger at the Metropole Hotel, and then drove some little distance westwardly, to Broadway, and then south along Broadway and on the west side, to Front Street, thence on the north side of the defendant's tracks west on Front street. Broadway and Front street intersect at right angles a short distance south of the Northern Pacific tracks, which in turn intersect Broadway. The street car line of the defendant and appellant runs along Broadway, and continues in a westerly direction along Front street, which latter street runs east and west. The plaintiff, on reaching Front street, kept on the right side, that is to say, on the north side of the street car track, and drove along and upon said street at a slow trot, and, according to some of the evidence, at least, within a few in-

ches of the north rail of the track. It was proved that the street car which occasioned the accident extended over 3 feet beyond such outer rail of the track, so that, according to the weight of the testimony, the plaintiff and respondent was at no time without the area of the street car, though there were times when he was not actually upon the track. It was a rainy morning. As he turned west on front street he looked back as far as the Northern Pacific tracks, north on Broadway a distance of from 150 to 175 feet (though the exact distance is not shown in the evidence, but merely in the arguments of counsel), and saw no car south of such track. He then, as stated, proceeded on Front street with the south wheels of his hack within a few inches of the north rail of the street car track. He was driving at a trot. He continued in this position until about the middle of the block, that is to say, until he was about 480 feet west of the intersection of Broadway and Front street, and, without again looking to the rear, turned suddenly to the south and across the track, and so close to an approaching car that after he turned the car could not possibly have been stopped, and he was struck and injured. The evidence shows, at least there is credible evidence which shows, that even before plaintiff turned to the south and directly across the track, and, indeed, all the time that he was on said Front street, he was within a few inches of the north rail of the street car track and within the area of the car, so that the collision would have occurred whether he had turned across the track or not, so that it cannot be said that the turning south across the track was the occasion of the accident. All of the witnesses testify that the motorman applied the brakes and reverse as soon as he saw the hack turn south and across the track. One witness testified that the car was going at an unusual speed. Another witness testified: "It seems to me that the car was running fast, but of course I am no judge." Another testified that "the car was coming fast." Another testified, "The speed of the car was 6 to 8 miles per hour." The jury found that defendant's car was moving at the time of the accident 14 miles an hour, and that the time which elapsed between the place where plaintiff looked back to see whether a street car was on Broadway, that is to say, the time when he first reached Front street, and the time of the accident, was one minute. Two witnesses testified positively that the gong was not sounded,—that no gong rang. The respondent and three of his wit-

nesses testified that they heard no gong. Six witnesses, that the gong was sounded. The question of the ringing of the gong, therefore, was one for the jury. The special verdict found that the car at the time of the accident was moving at the rate of 14 miles per hour; that the plaintiff was driving his team at the rate of 3 miles an hour; that no gong was sounded; that the motorman was guilty of lack of ordinary care in the operation of his car at the time of the accident; that such want of ordinary care proximately caused the injury; that plaintiff looked back upon arriving at Front street but not afterwards; that he listened for the approach of the car, however, from the rear; that he could not, in the exercise of ordinary care and diligence, have seen the approaching car in time to avoid the accident; that he was not guilty of any want of ordinary care which contributed to the injury; that after the motorman saw the plaintiff drive on the track he had time to stop the car and avoid the accident; that the plaintiff listened for the approach of the car from the rear; that he went so near the track that the car could not pass him without hitting his wagon; that the motorman, after he saw plaintiff's danger, did not make a reasonable effort to reduce the car to proper control, nor did he do so when he saw the plaintiff's vehicle on or near the track; that one minute elapsed between the place where the plaintiff looked back to see whether a car was on Broadway south of the Northern Pacific track and the time when he was struck by the defendant's car on Front street; that the plaintiff arrived upon or near the track of the defendant company so near the car in question that the motorman in charge of such car, after seeing him exposed to danger, might have avoided injuring him by the exercise of ordinary or reasonable care; that the motorman did not use ordinary care to reduce the car to control for such purpose. It also found generally the fact of the accident and the injuries, etc.; also that "the car was running at a dangerous rate of speed at the time of the accident." From a judgment for damages, for injuries to the plaintiff, both to himself, his horses, and his carriage, in the sum of \$2,625, with interest, defendant appeals to this court.

Appellant assigns as error that such special verdict was insufficient to sustain the judgment, and that the court erred in refusing to grant its motion for a directed verdict and in entering judgment for the plaintiff thereon. It states that the evidence was insufficient to sustain the

verdict in that it wholly failed to show that the defendant was guilty of any negligence which caused or contributed to the injuries sustained; that it failed to show that the defendant did not exercise due care in the running of the street car; that the gong was not repeatedly sounded; that the speed of the car was excessive; that the car was not under control, and was not stopped as soon as possible; and defendant maintains that the proof of the plaintiff affirmatively discloses that he was guilty of contributory negligence in that, while driving ahead of defendant's car in the middle of the block, he turned suddenly south across the track, immediately in front of the street car, and drove up on the track without listening or looking, when the car of the defendant was so near to him that had he listened or had he looked he must have seen it and avoided the accident. Other errors were assigned, but were not urged by counsel either in his brief or oral argument, and may therefore be deemed to have been waived.

Stambaugh & Fowler, for appellant.

The special verdict herein was insufficient to sustain the judgment entered thereon. A special verdict should find the ultimate physical facts put in issue by the pleadings, and will not support a judgment if it merely finds conclusions of law or conclusions of fact. *Lee v. Chicago, St. P. M. & O. R. Co.* 101 Wis. 352, 77 N. W. 717; *Davis v. Farmington*, 42 Wis. 425; *Laird v. Otsego*, 90 Wis. 25, 62 N. W. 1042; *Morrison v. Lee*, 13 N. D. 600, 102 N. W. 223; *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760; *Gaston v. Bailey*, 14 Ind. App. 581, 43 N. E. 254; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186, 11 Am. Neg. Rep. 437; *Chicago, St. L. & P. R. Co. v. Burger*, 124 Ind. 275, 24 N. E. 981; *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; 9 Am. Neg. Cas. 288; *Walkup v. May*, 9 Ind. App. 409, 36 N. E. 917; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443, 24 L.R.A.(N.S.) 1, note, particularly pp. 30-78.

Right to attack sufficiency of special verdict to support the judgment, is not waived or lost, by failure to object that other questions are not submitted, or failure to request them. Where a judgment is based upon a special verdict alone, which fails to determine all the material and controverted facts in issue, there can be no waiver. *Sherman v. Meno-*

minee River Lumber Co. 77 Wis. 14, 45 N. W. 1079; Johnson Bros. v. Glaspey, 16 N. D. 335, 113 N. W. 602.

The respondent was guilty of such contributory negligence as to preclude a recovery. He failed to look and listen. A driver of a vehicle—particularly when crossing track in the middle of a block, and not at a street crossing or intersection—must both look and listen before crossing. 2 Thomp. Neg. § 1438; 7 Thomp. Neg. § 1438; Nellis, Street R. Acci. Law, 2d ed. p. 947, p. 968.

Such rule has been adopted in the following states: Ala.—Highland Ave. & Belt R. Co. v. Sampson, 112 Ala. 425, 20 So. 566; Birmingham R. Light & P. Co. v. Oldham, 141 Ala. 195, 37 So. 452, 3 Ann. Cas. 333; Cal.—Harrington v. Los Angeles R. Co. 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 Pac. 15; Bailey v. Market Street Cable R. Co. 110 Cal. 320, 42 Pac. 914; Del.—Cox v. Wilmington City R. Co. 4 Penn. (Del.) 162, 53 Atl. 569; Snyder v. People's R. Co. 4 Penn. (Del.) 145, 53 Atl. 433; Ga.—Cain v. Macon Consol. Street R. Co. 97 Ga. 298, 22 S. E. 918; Ind.—Robards v. Indianapolis Street R. Co. 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953; McCoy v. Kokomo R. & Light Co. 158 Ind. 662, 64 N. E. 92; Young v. Citizens' Street R. Co. 148 Ind. 54, 44 N. E. 927, 47 N. E. 142, 2 Am. Neg. Rep. 703; Iowa—Reem v. Tama & T. Electric R. & Light Co. 104 Iowa, 563, 73 N. W. 1045; Kan.—Honick v. Metropolitan Street R. Co. 66 Kan. 124, 71 Pac. 265; Burns v. Metropolitan Street R. Co. 66 Kan. 188, 71 Pac. 244; Metropolitan Street R. Co. v. Agnew, 65 Kan. 478, 70 Pac. 345, 12 Am. Neg. Rep. 599; La.—Schutt v. Shreveport Belt R. Co. 109 La. 500, 33 So. 577; Cowden v. Shreveport Belt R. Co. 106 La. 236, 30 So. 747; Snider v. New Orleans & C. R. Co. 48 La. Ann. 1, 18 So. 695; Md.—Baltimore Traction Co. v. Helms, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119, 1 Am. Neg. Rep. 63; Me.—Warren v. Bangor, O. & O. T. R. Co. 95 Me. 115, 49 Atl. 609, 10 Am. Neg. Rep. 67; Mass.—Hurley v. West End Street R. Co. 180 Mass. 370, 62 N. E. 263; Bierne v. Lawrence & M. Street R. Co. 197 Mass. 173, 83 N. E. 359; Mich.—McCarthy v. Detroit Citizens' Street R. Co. 120 Mich. 400, 79 N. W. 631; Mo.—Giardina v. St. Louis & M. River R. Co. 185 Mo. 330, 84 S. W. 928; N. J.—VanNess v. North Jersey Street R. Co. 75 N. J. L. 273, 67 Atl. 1027; Shuler v. North Jersey Street R. Co. 75 N. J. L. 824, 127 Am. St. Rep. 834, 69 Atl.

180; N. Y.—*Martin v. Third Ave. R. Co.* 27 App. Div. 52, 50 N. Y. Supp. 284; *McKinley v. Metropolitan Street R. Co.* 77 App. Div. 256, 79 N. Y. Supp. 213; *Rider v. Syracuse Rapid Transit R. Co.* 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836; Or.—*Wolf v. City & Suburban R. Co.* 45 Or. 446, 72 Pac. 329, 78 Pac. 668; Pa.—*Moser v. Union Traction Co.* 205 Pa. 481, 55 Atl. 15; R. I.—*Price v. Rhode Island R. Co.* 28 R. I. 220, 125 Am. St. Rep. 736, 66 Atl. 200; *Beerman v. Union R. Co.* 24 R. I. 275, 52 Atl. 1090; Tenn.—*Knoxville Traction Co. v. Brown*, 115 Tenn. 323, 89 S. W. 319; Tex.—*Citizens' R. Co. v. Holmes*, 19 Tex. Civ. App. 266, 46 S. W. 116; Va.—*Portsmouth Street R. Co. v. Peed*, 102 Va. 662, 47 S. E. 850; Wis.—*Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; W. Va.—*Riedel v. Wheeling Traction R. Co.* 63 W. Va. 522, 16 L.R.A.(N.S.) 1123, 61 S. E. 821.

It is negligence, as a matter of law, for a driver of a vehicle to turn suddenly across a street car track in front of a moving car, without ascertaining whether a car is coming. 2 *Thomp. Neg.* § 1470 and cases cited.

A clear case of contributory negligence is where the driver suddenly and without warning, and without looking, turns his horse across a street railway track directly in front of an approaching car. *Indianapolis Street R. Co. v. Marschke*,— Ind. App. —, 70 N. E. 494; *Indianapolis Street R. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; *Fairbanks v. Bangor, O. & O. R. Co.* 95 Me. 78, 49 Atl. 421; *Hannon v. North Jersey Street R. Co.* 65 N. J. L. 547, 47 Atl. 803; *McHugh v. North Jersey Street R. Co.* — N. J. L. —, 46 Atl. 782; *Reichenberg v. Interurban Street R. Co.* 84 N. Y. Supp. 523; *Reed v. Metropolitan Street R. Co.* 58 App. Div. 87, 68 N. Y. Supp. 539; *Fritz v. Detroit Citizens' Street R. Co.* 105 Mich. 50, 62 N. W. 1007; *Boerth v. West Side R. Co.* 87 Wis. 288, 58 N. W. 376; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *Borshall v. Detroit R. Co.* 115 Mich. 473, 73 N. W. 551; *Moser v. Union Traction Co.* 205 Pa. 481, 55 Atl. 15; *McGee v. Consolidated Street R. Co.* 102 Mich. 107, 26 L.R.A. 300, 47 Am. St. Rep. 507, 60 N. W. 293; *Kessler v. Citizens' Street R. Co.* 20 Ind. App. 427, 50 N. E. 891; *Davidson v. Denver Tramway Co.* 4 Colo. App. 283, 35 Pac. 920; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Cicardi v. St. Louis*

Transit Co. 108 Mo. App. 462, 83 S. W. 980; Seele v. Boston & N. Street R. Co. 187 Mass. 248, 72 N. E. 971; Butler v. Rockland, T. & C. Street R. Co. 99 Me. 149, 100 Am. St. Rep. 267, 58 Atl. 775; Harris v. Lincoln Traction Co. 78 Neb. 681, 111 N. W. 580; Hurley v. West End Street R. Co. 180 Mass. 370, 62 N. E. 263; Kelly v. Wakefield & S. Street R. Co. 175 Mass. 331, 56 N. E. 285; Dunn v. Old Colony Street R. Co. 186 Mass. 316, 71 N. E. 557; Riedel v. Wheeling Traction Co. 63 W. Va. 522, 16 L.R.A.(N.S.) 1123, 61 S. E. 821; Helber v. Spokane Street R. Co. 22 Wash. 319, 61 Pac. 40.

Where the facts disclose a case wherein the failure to look and listen was such clear negligence that no two minds could differ in pronouncing it such, the court should rule, as a matter of law, that the plaintiff was guilty of such contributory negligence as to prevent him from recovery. Terien v. St. Paul City R. Co. 70 Minn. 532, 73 N. W. 412; Russell v. Minneapolis Street R. Co. 83 Minn. 304, 86 N. W. 346; Hickey v. St. Paul City R. Co. 60 Minn. 119, 61 N. W. 893; Donovan v. Lynn & B. R. Co. 185 Mass. 533, 70 N. E. 1029; Seele v. Boston & N. Street R. Co. 187 Mass. 248, 72 N. E. 971; Robinson v. Rockland, T. & C. Street R. Co. 99 Me. 47, 58 Atl. 57, 16 Am. Neg. Rep. 356; Helliesen v. Seattle Electric Co. 56 Wash. 278, 105 Pac. 458.

The traveler should look and listen both ways attentively, for a coming car, at places where these acts will be reasonably certain to effect their purpose, and this duty is not performed by a traveler who looks when he first enters on a street, but does not thereafter, until he is on the track. 2 Thomp. Neg. § 1444; 7 Thomp. Neg. § 1439; Snider v. New Orleans & C. R. Co. 48 La. Ann. 1, 18 So. 695; Healey v. Brooklyn Heights R. Co. 18 App. Div. 623, 45 N. Y. Supp. 393; Cawley v. La Crosse City R. Co. 101 Wis. 145, 77 N. W. 179; McGee v. Consolidated Street R. Co. 102 Mich. 107, 26 L.R.A. 300, 47 Am. St. Rep. 507, 60 N. W. 293; Winch v. Third Ave. R. Co. 12 Misc. 403, 33 N. Y. Supp. 615; Hemingway v. New Orleans City & Lake R. Co. 50 La. Ann. 1087, 23 So. 952; Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L.R.A. 618, 84 N. W. 823, 9 Am. Neg. Rep. 388; Denver City Tramway Co. v. Cobb, 90 C. C. A. 459, 164 Fed. 41; Hart v. Northern P. R. Co. 116 C. C. A. 12, 196 Fed. 180.

The doctrine of "last clear chance" does not apply in this case. To take advantage of such rule, it must be properly pleaded. *Clancy v. St. Louis Transit Co.* 192 Mo. 615, 91 S. W. 509; *Gront v. Central Electric R. Co.* 125 Mo. App. 552, 102 S. W. 1026.

The burden of proof is upon plaintiff to prove not only negligence on the part of defendant, but that the "last clear chance" doctrine is established. *Crenshaw v. Asheville & B. Street R. & Transp. Co.* 144 N. C. 314, 56 S. E. 945.

Plaintiff must establish by a preponderance of the evidence, not only the defendant's negligence, but that such negligence was the proximate cause of the injury. *Ibid*; *McGauley v. St. Louis Transit Co.* 179 Mo. 583, 79 S. W. 461; *Markowitz v. Metropolitan Street R. Co.* 186 Mo. 350, 69 L.R.A. 389, 85 S. W. 351; *Denver City Tramway Co. v. Cobb*, 90 C. C. A. 459, 164 Fed. 43, and cases cited; *Alger S. & Co. v. Duluth-Superior Traction Co.* 93 Minn. 314, 101 N. W. 298, 17 Am. Neg. Rep. 95; *Fellenz v. St. Louis & Suburban R. Co.* 106 Mo. App. 154, 80 S. W. 49; *Drown v. Northern Ohio Traction Co.* 76 Ohio St. 234, 10 L.R.A.(N.S.) 421, 118 Am. St. Rep. 844, 81 N. E. 326.

The doctrine of "last chance" can only be applied in cases where the negligence of the defendant is proximate, and that of the plaintiff remote. It cannot apply where the negligence of both is concurrent or continuous. *State use of Carey v. Cumberland & W. Electric R. Co.* 106 Md. 529, 16 L.R.A.(N.S.) 297, 68 Atl. 197; *Kelly v. Boston Elev. R. Co.* 197 Mass. 420, 15 L.R.A.(N.S.) 282, 83 N. E. 865; *Volosko v. Interurban Street R. Co.* 190 N. Y. 206, 15 L.R.A.(N.S.) 1117, 82 N. E. 1090; *Tognazzi v. Milford & U. Street R. Co.* 201 Mass. 7, 21 L.R.A.(N.S.) 309, 86 N. E. 799; 1 *Thomp. Neg.* § 177.

V. R. Lovell, for respondent.

The question whether negligence or contributory negligence exists, except when there is no conflict in the evidence, has always been held by this court to be a question of fact for the jury. *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427; *Mares v. Northern P. R. Co.* 3 Dak. 336, 21 N. W. 5 (affirmed in 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321); *Boss v. Northern P. R. Co.* 5 Dak. 308, 40 N. W. 590; *McTavish v. Great Northern R. Co.* 8 N. D. 333,

79 N. W. 443; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972.

Plaintiff is presumed to be in the exercise of ordinary care, and contributory negligence is a matter of defense. Mares v. Northern P. R. Co. 3 Dak. 336, 21 N. W. 5; Sanders v. Reister, 1 Dak. 151, 46 N. W. 680; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Gram v. Northern P. R. Co. 1 N. D. 252, 46 N. W. 972; Kunkel v. Minneapolis, St. P. & Ste. M. R. Co. 18 N. D. 380, 121 N. W. 830; Cameron v. Great Northern R. Co. 8 N. D. 133, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972.

It is not objectionable that the answer of the jury to a special interrogatory is a conclusion of fact.

If an inference or conclusion from a fact or facts is itself a fact proper to be found by a jury, it may be made the subject of an interrogatory. Udell v. Citizens' Street R. Co. 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799, 5 Am. Neg. Rep. 562.

Special verdicts should find the ultimate or constitutive facts, and not matters which are merely evidentiary in their nature. Russell v. Meyer, 7 N. D. 340, 47 L.R.A. 637, 75 N. W. 262; Lathrop v. Fargo-Morehead Street R. Co. 23 N. D. 246, 136 N. W. 88; Fraser v. Churchman, 43 Ind. App. 200, 86 N. E. 1029.

Evidentiary matters in the verdict are not fatal to the judgment. Terre Haute & I. R. Co. v. Brunker, 128 Ind. 542, 26 N. E. 178; Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Voris v. Star City Bldg. & L. Asso. 20 Ind. App. 630, 50 N. E. 779; Miller v. Shackelford, 4 Dana, 264; Louisville, N. A. & C. R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343, 9 Am. Neg. Cas. 288; Toledo, St. L. & K. C. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Hogan v. Chicago, M. & St. P. R. Co. 59 Wis. 139, 17 N. W. 632; Fick v. Chicago & N. W. R. Co. 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527; Winchell v. Abbot, 77 Wis. 371, 46 N. W. 665; MacCarthy v. Whitcomb, 110 Wis. 113, 85 N. W. 707; Louisville N. A. & C. R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Louisville, N. A. & C. R. Co. v. Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; Fraser v. Churchman, 43 Ind. App. 200, 86 N. E. 1029; Locke v. Merchants' Nat. Bank, 66 Ind. 353; Kealing v. Vansickle, 74 Ind. 529,

39 Am. Rep. 101; Whitcomb v. Smith, 123 Ind. 329, 24 N. E. 109; Railsback v. Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119; Branson v. Studabaker, 133 Ind. 147, 33 N. E. 98; Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812; Nelson v. Chicago, M. & St. P. R. Co. 60 Wis. 320, 19 N. W. 52; Rahr v. Manchester F. Assur. Co. 93 Wis. 355, 67 N. W. 725.

Special verdicts are to be fairly and reasonably construed for the purpose of aiding, not obstructing, the business of the court. Clementson, Special Verdicts, p. 262; Fenske v. Nelson, 74 Minn. 1, 76 N. W. 785.

Questions relating to facts admitted in the pleadings, or as to which there is no controversy, need not be submitted to the jury. Schrubbe v. Connell, 69 Wis. 476, 34 N. W. 503; Heddles v. Chicago & N. W. R. Co. 74 Wis. 239, 42 N. W. 237; Burton v. Boyd, 7 Kan. 28; McGonigle v. Gordon, 11 Kan. 167; Fenske v. Nelson, 74 Minn. 1, 76 N. W. 785; Barton v. Himrod, 8 N. Y. 485, 59 Am. Dec. 506; Ward v. Busack, 46 Wis. 407, 1 N. W. 107; Miller v. Luco, 80 Cal. 257, 22 Pac. 198.

Form of special verdict must be largely in the discretion of the trial court, and, if questions are reasonably specific, and cover the disputed issues of fact, the appellate court will not interfere. Hoppe v. Chicago, M. & St. P. R. Co. 61 Wis. 357, 21 N. W. 227; Bartlett v. Beardmore, 77 Wis. 356, 46 N. W. 494; Elizabethton Shoe Co. v. Hughes, 123 N. C. 296, 29 S. E. 339; Zimmer v. Fox River Valley Electric R. Co. 118 Wis. 614, 95 N. W. 957; Toledo St. L. & K. C. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 444; Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Coveny v. Hale, 49 Cal. 552; Miller v. Luco, 80 Cal. 257, 22 Pac. 198; Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Severy v. Chicago, R. I. & P. R. Co. 6 Okla. 153, 50 Pac. 162, 3 Am. Neg. Rep. 463; Puterbaugh v. Puterbaugh, 131 Ind. 288, 15 L.R.A. 341, 30 N. E. 519; Manatt v. Scott, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; Evansville & T. H. R. Co. v. Taft, 2 Ind. App. 237, 28 N. E. 443; Bogan v. Carolina C. R. Co. 129 N. C. 154, 55 L.R.A. 418, 39 S. E. 808.

One is not required unqualifiedly, to look and listen before cross-

ing a street railroad; nor is it negligence, as a matter of law, to fail to do so. The question is whether a prudent man, acting prudently, would have thought it necessary to do so. *Warren v. Bangor, O. & O. T. R. Co.* 95 Me. 115, 49 Atl. 609, 10 Am. Neg. Rep. 67, cited by appellant. *Portsmouth Street R. Co. v. Peed*, 102 Va. 662, 47 S. E. 850, also cited by appellant.

The general rule is that each party, in the use of the highway, is bound to exercise such caution and care to prevent injury to others, as ordinarily prudent and careful men would exercise, under all the conditions and circumstances surrounding the time and place of the accident. *Cox v. Wilmington City R. Co.* 4 Penn. (Del.) 162, 53 Atl. 569; 2 Thomp. Neg. p. 1443.

The question of negligence, contributory or otherwise, is necessarily dependent upon the facts surrounding each case. *Detroit United R. Co. v. Nichols*, 91 C. C. A. 257, 165 Fed. 296; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119, 1 Am. Neg. Rep 63.

The rule that one approaching a railroad crossing upon a highway must look up and down the track before he attempts to cross is not applicable as a hard and fast rule to one who attempts to cross a street car track upon a public street. *Shea v. St. Paul City R. Co.* 50 Minn. 395, 52 N. W. 902; *Richmond v. Tacoma, R. & P. Co.* 67 Wash. 444, — L.R.A.(N.S.) —, 122 Pac. 351; *Roberts v. Spokane Street R. Co.* 23 Wash. 325, 54 L.R.A. 184, 63 Pac. 506; 36 Cyc. 1539, cases cited in note 73; 36 Cyc. 1554, cases cited in notes 46, 47.

Reasonable care and prudence do not require one to repeatedly or continually look back, before crossing a street car track. *Acton v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225; *Bensiek v. St. Louis Transit Co.* 125 Mo. App. 121, 102 S. W. 587; *Miller v. Buffalo & L. E. Traction Co.* 149 App. Div. 396, 134 N. Y. Supp. 380.

Under our system of code pleading, no reply is proper, except to traverse a counterclaim. Rev. Codes § 6863.

Allegations of contributory negligence or other new matter in the answer not relating to a counterclaim are to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may be. Rev. Codes, § 6878; 6 Thomp. Neg. ¶ 7466.

The office of a bill of particulars is to inform the opposite party and the court of the precise nature and character of the cause of action or defense upon which the pleader relies. 31 Cyc. 565, cases cited in note 21.

The court may allow amendment of a bill of particulars, the same as any other part of the pleading. *Laflin v. Shackleford*, 39 C. C. A. 102, 98 Fed. 372; *Waidner v. Pauly*, 141 Ill. 442, 30 N. E. 1025; *Lester v. Thompson*, 91 Mich. 245, 51 N. W. 893.

A general allegation of negligence is all that is necessary to admit proof of liability by reason of discovered peril. *Hanlon v. Missouri P. R. Co.* 104 Mo. 381, 16 S. W. 235; *Powers v. Des Moines City R. Co.* — Iowa, —, 115 N. W. 494; *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 51 N. W. 781.

Damages may be recovered for injury caused by defendant's negligence, notwithstanding plaintiff's negligence in exposing his property to injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the danger of plaintiff's property, to use ordinary care for the purpose of avoiding injury. *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972.

Where the jury has made a specific finding, based upon substantial proof, it is not the function of the court to determine the question of preponderance, as to such finding, especially where the trial court has upheld the same, on motion for a new trial. *Acton v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225; *Lowry v. Piper*, 20 N. D. 637, 127 N. W. 1046; *Corey v. Bank*, 20 N. D. 311; *Heyrock v. McKenzie*, 8 N. D. 601, 80 N. W. 762; *Howland v. Ink*, 8 N. D. 63, 76 N. W. 992; *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988; *Black v. Walker*, 7 N. D. 414, 75 N. W. 787; *Halley v. Folsom*, 1 N. D. 325, 48 N. W. 219; 2 *Nellis, Street Railways*, 2d ed. p. 899, note 79, and cases cited in ¶ 401.

BRUCE, J. (after stating the facts as above). We think that there is no merit in the appellant's first proposition, that the judgment should be reversed because certain of the questions propounded to the jury and inserted in the special verdict called for conclusions of law and conclusions of fact, and not ultimate, physical facts. These questions and answers were as follows: "(4) Was the motorman guilty of any

want of ordinary care in the operation of his car at the time of the accident? Answer: Yes. (5) If you answer the last question, 'yes,' then was such want of ordinary care the proximate cause of the injury to plaintiff? Answer: Yes." "(9) Could the plaintiff, in the exercise of ordinary care and prudence, have seen the approaching car in time to have avoided the accident? Answer: No. (10) Was the plaintiff guilty of any want of ordinary care which contributed to produce the injury complained of? Answer: No. (11) After the motorman saw the defendant drive onto the track, did he, in the exercise of ordinary care, have time to stop the car and avoid the accident? Answer: Yes." "(13) After the motorman saw, or, by the exercise of ordinary care might have seen, the plaintiff's danger, did the motorman make a reasonable effort to reduce the car to such control that it might be brought to a standstill, if necessary, without a collision? Answer: No. (14) After the motorman saw, or by the exercise of ordinary care might have seen, the plaintiff's vehicle on or near the track of the defendant street car company and in the line of the progress of said car, did the motorman make every effort to place the power which propelled such car under his control for the purpose of avoiding a collision? Answer: No." "(16) Did the plaintiff arrive upon or near the track of the defendant street car company so far ahead of the car in question that the motorman in charge of such car, after seeing him thus exposed to danger, might have avoided injuring him by the exercise of ordinary or reasonable care? Answer: Yes. (17) After the motorman in defendant's street car discovered, or by the exercise of reasonable and ordinary care should have discovered, the plaintiff's vehicle on or near the track of the defendant street car company, and directly in line of the progress of the car and a possible obstacle in the way of such car, did the motorman use ordinary and reasonable care to reduce the car to such control that it might be brought to a standstill if necessary, without colliding with the plaintiff's vehicle? Answer: No." "(28) Was the car of the defendant railway company running at a dangerous rate of speed, taking into consideration all the circumstances at the time of the accident or collision? Answer: Yes."

By all of these questions the jury was, in different ways, directed to find whether appellant was guilty of any want of ordinary care, and,

if so, whether such want of ordinary care was the proximate cause of respondent's injury. The questions of negligence and contributory negligence are both, according to the former decisions of this court and the overwhelming weight of authority, questions of fact, rather than of law, and only become questions of law when the facts are undisputed. *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427; *Bishop v. Chicago, M. & St. P. R. Co.* 4 N. D. 536, 62 N. W. 605; *Mares v. Northern P. R. Co.* 3 Dak. 336, 21 N. W. 5, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; *Boss v. Northern P. R. Co.* 5 Dak. 308, 40 N. W. 590; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972; *Kucera v. Merrill Lumber Co.* 91 Wis. 637, 65 N. W. 374; *Bagnowski v. A. J. Linderman & H. Co.* 93 Wis. 592, 67 N. W. 1131; *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L.R.A. 654, 57 Am. St. Rep. 935, 67 N. W. 16, 1132, 10 Am. Neg. Cas. 507; *Klatt v. N. C. Foster Lumber Co.* 92 Wis. 622, 66 N. W. 791; *Kutchera v. Goodwillie*, 93 Wis. 448, 67 N. W. 729; *Rysdorp v. George Pankratz Lumber Co.* 95 Wis. 622, 70 N. W. 677, 2 Am. Neg. Rep. 269; *Andrews v. Chicago, M. & St. P. R. Co.* 96 Wis. 348, 71 N. W. 372, 3 Am. Neg. Rep. 626. The trial court properly instructed the jury as to the meaning of the terms "negligence," "ordinary care," and "proximate cause," and as to the rights and duties of the traveling public and of street car companies, respectively, upon the public thoroughfares. Where this is done, interrogatories such as those propounded in the case at bar have repeatedly been held not merely proper, but to be necessary to a special verdict in a case such as that before us. *Andrews v. Chicago, M. & St. P. R. Co.* 96 Wis. 348, 71 N. W. 372, 3 Am. Neg. Rep. 626; *Sheridan v. Bigelow*, 93 Wis. 426, 67 N. W. 732; *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178; *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147, 64 N. W. 891. "It being difficult [indeed] to differentiate between conclusions, ultimate facts and evidentiary facts when facts are close to the line dividing the inferential facts from the evidentiary facts, the only safe plan is to incorporate them in the special verdict." *Fraser v. Churchman*, 43 Ind. App. 200, 86 N. E. 1029. The real things to be avoided are questions which call for a conclusion upon matters which are merely evidentiary in their nature, and which merely tend to show

the existence of the ultimate facts. If, however, an inference or conclusion from a fact or facts is, itself, a fact proper to be found by the jury, and is in the nature of an ultimate, constitutive fact, which is necessary to support the judgment of the court, such fact or conclusion may be made the proper subject of an interrogatory. *Udell v. Citizens' Street R. Co.* 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799, 5 Am. Neg. Rep. 562; *Russell v. Meyer*, 7 N. D. 340, 47 L.R.A. 637, 75 N. W. 262; *Lathrop v. Fargo-Moorhead Street R. Co.* 23 N. D. 246, 136 N. W. 88.

It is to be remembered, indeed, that special verdicts are to be fairly and reasonably construed, and to be used and treated, not as pitfalls for the litigants, but as aids to the administration of justice. *Clementson, Special Verdicts*, p. 262; *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357, 21 N. W. 227; *Bartlett v. Beardmore*, 77 Wis. 356, 46 N. W. 494; *Elizabethton Shoe Co. v. Hughes*, 122 N. C. 296, 29 S. E. 339; *Zimmer v. Fox River Valley Electric R. Co.* 118 Wis. 614, 95 N. W. 957. It is also to be borne in mind that only those facts which are in controversy need be submitted. *Schrubbe v. Connell*, 69 Wis. 476, 34 N. W. 503; *Heddles v. Chicago & N. W. R. Co.* 74 Wis. 239, 42 N. W. 237; *Burton v. Boyd*, 7 Kan. 28; *McGonigle v. Gordon*, 11 Kan. 167; *Ward v. Busack*, 46 Wis. 407, 1 N. W. 107.

The second point of appellant, and to which he has devoted the greater portions of his brief and argument, is that the plaintiff was guilty of such contributory negligence as precludes a recovery as a matter of law. All of defendant's argument, however, is based upon the proposition that "respondent turned west on Front street at the Commercial Bank crossing, after looking to the rear about 150 feet to the Northern Pacific tracks, and drove at least 480 feet west to the middle of the block, and without again looking to the rear, turned suddenly across the track immediately in front of the car, in the middle of the block, and so close that the car could not possibly have been stopped, and was struck and injured." He argues, and produces authorities upon the proposition, that when one approaches a street railway track for the purpose of crossing the same, it is his duty to both look and listen, and asserts that the evidence shows that in the case at bar, though the plaintiff may have listened, he totally failed

to look before attempting to cross the track. There might be much in this proposition if the uncontradicted evidence supported this contention, and also showed that the crossing of the tracks was (the)* a proximate or operative cause of the injury, but it does not. It shows on the other hand, at least much of the testimony goes to prove, that the side of the street car extended 3 feet beyond the rail of the track itself on each side; that portions of plaintiff's vehicle projected 6 inches outside of the track of its wheels; and that not only just before the accident, but during practically all of the 480 feet journey from the corner of Broadway and Front street and along said Front street, plaintiff was driving with his south wheels within a few inches of the north rail of the car track, in a position of danger unless proper care was used by the street car driver, and within the track of the *car*, if not of the rails. He did not, therefore, according to this testimony (and it was for the jury to believe whom it chose), strictly speaking, *approach* the track at all. He, it is true, immediately before the collision, turned across the track to the south, but there is at least some evidence to show that he would have been struck by the car whether he had so turned or not. Such evidence, indeed, shows that he did not move from a position of safety to a position of peril immediately before the collision, or practically at any time after he reached Front street, but that he was, as a matter of fact, on account of his position near the track and the speed of the approaching car of which, according to such testimony, he had no knowledge or warning, in a position of peril all of the time that he was upon the said street. Since, then, there is evidence to show that he looked back at the time, or just before, he turned on Front street and saw no car approaching on Broadway, and that the car was running at a rate of at least 6 miles an hour (one witness testifies from 6 to 8 miles an hour; another, that it was running fast, and the jury found that it was 14 miles) we cannot hold, as a matter of law, that he was guilty of such contributory negligence as would preclude a recovery. We must remember that though there is some conflicting evidence and much that is merely negative, there is at least some positive testimony that the gong was not sounded at all. We realize, of course, that there is a conflict in the evidence, but we also realize that plaintiff's propositions are sustained by some evidence, at least, and that it was for the jury, and not for the court,

* See decision on rehearing p. 480.

to pass upon the credibility of the witnesses. *Acton v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225.

The judgment of the District Court is affirmed.

On Petition for Rehearing.

BRUCE, J. Counsel for appellant takes exception to the expressions used by the court in the original opinion, "and also showed that the crossing of the tracks was *the* proximate or operative cause of the injury." The language used should probably have been: "And also showed that the crossing of the track was *a* proximate or operative cause of the injury." In other words, the word "the" should be stricken out, and the word "a" should be inserted in lieu thereof. This we have done in the original opinion. As so changed, we believe, the statement to be correct.

He also calls attention to the cases of *Fritz v. Detroit Citizens' Street R. Co.* 105 Mich. 50, 62 N. W. 1007; *Boerth v. West Side R. Co.* 87 Wis. 288, 58 N. W. 376; *McCormick v. Ottumwa R. & Light Co.* 146 Iowa, 119, 124 N. W. 889; *Tognazzi v. Milford & U. Street R. Co.* 201 Mass. 7, 21 L.R.A.(N.S.) 309, 86 N. E. 799; *State use of Carey v. Cumberland & W. Electric R. Co.* 106 Md. 529, 16 L.R.A.(N.S.) 297, 68 Atl. 197; *Winch v. Third Ave. R. Co.* 12 Misc. 403, 33 N. Y. Supp. 615, and argues that they are cases like the one at bar where the plaintiff was, during the whole of the time in which he was driving upon the street where injured, within the track of the car or zone of danger, and asserts that they are so directly in point and conclusive that they should not be ignored by this court. He states, indeed, that his argument has been based squarely upon the assumption of the truth of every fact which the original opinion stated *some* of the evidence supported, but maintains that even then, under the law and under the cases cited by him, the plaintiff was guilty of contributory negligence and cannot recover. We do not, however, so understand the cases, and an analysis will show that they are really not in point. It is for this reason that they were passed over in the principal opinion. In the case of *Fritz v. Detroit Citizens' Street R. Co.* 105 Mich. 50, 62 N. W. 1007, for instance, although the facts in the main are similar, there is one material difference, and

that is that, if the plaintiff had remained driving as he was before he turned upon the track, and the defendant had done the same, and the plaintiff had not turned upon the track, there would have been no accident. In the case at bar, however, the evidence tends strongly to show that the accident would have happened whether the plaintiff had turned upon the track or not. In the Michigan case the court said: "It is therefore negligence for the driver of a carriage to suddenly turn directly in front of an approaching car, whether the car be coming from the direction in which he is driving or from the rear. We think it is also true that, in the absence of something to excuse the performance of that duty, it is incumbent upon the driver of such a vehicle, before attempting to turn across the track, to take proper means of ascertaining whether the way is clear, and this is especially true of an attempt to turn across the track in the middle of a block, or at any place other than a regular crossing. See *Watson v. Minneapolis Street R. Co.* 53 Minn. 551, 55 N. W. 742, 12 Am. Neg. Cas. 146. This the plaintiff failed to do in this case. Unless he had the right to assume that there was no car in the rear with which he was likely to come in contact, or unless he had the right to rely upon his failure to hear the sound of the gong, it was clearly negligence for him to turn across the track suddenly and without assuring himself by proper investigation that no car was coming. *Booth, Street Railways*, § 315. In fact, until the car approached the crossing it is very doubtful whether it was the duty of the motorman to sound any gong." So far the opinion supports the contention of the appellant, but the words quoted are followed by others which control the same and which absolutely distinguish the cases. These words are: "So long as the plaintiff was traveling in the same direction and at such a gait as would not result in collision, it cannot be said that the motorman had any occasion to sound the gong, as he would have no reason to apprehend that the plaintiff would come to a stop or make a short turn across the track." Again, the court says: "But it is said that there was testimony from which the jury might have inferred that the plaintiff's position was discovered in time to enable . . . [him] to avoid the collision. It is a rule recognized by repeated decisions of this court, and maintained by text writers, that the fact of a precedent negligence of plaintiff resulting in producing

a situation or a condition known to defendant, who, after the discovery of such condition may, by the exercise of care avoid injury, is not a contributory cause to an injury thereafter produced by disregard of this discovered condition. One of the earliest cases to lay down this rule is *Davies v. Mann*, 10 Mees. & W. 546, 12 L. J. Exch. N. S. 10, 6 Jur. 954, 19 Eng. Rul. Cas. 190. This rule is well stated in *Bishop on Noncontract Law*, § 446; 'It is sometimes very correctly said that if one discovers another to have been negligent, he must take precautions accordingly, omitting which he is liable to the other for the damages which follow from his own want of care; for however nearly related two separate negligences may be, the one cannot bar an action for the other unless it is contributory, and though an unseen position might contribute to an accident, a discovered one cannot.' See also *Citizens' Street R. Co. v. Steen*, 42 Ark. 321. This rule has been applied by this court in street railway cases. See *Laethem v. Ft. Wayne & B. I. R. Co.* 100 Mich. 297, 58 N. W. 996; and *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 46, 29 L.R.A. 287, 61 N. W. 543. In each of these cases the situation of plaintiff was such that *it was apparent to the motorman that if the car continued in its course a collision would be inevitable, and this was apparent to him for a considerable time before the collision.* Do these cases necessarily rule the present? In this case it is apparent that the collision was of a sudden. The motorman did not see in advance that the plaintiff was about to cross the track, nor until a very few seconds before the collision actually occurred. It is not a case in which the plaintiff *had been driving up the track and was run down by the motorman, but an attempt to cross the track unexpected and sudden.* If we assume that under these circumstances the plaintiff had, by this act, placed himself in a position where his negligence might have been discovered and the car brought under control, it will result that in every case where an attempt to cross ahead of a street car is made, the question of whether there was a timely discovery of the situation will turn upon whether the motorman could have stopped his car after the attempt was made, and it would follow that if he could, his negligence will authorize a recovery, notwithstanding the contributory negligence of plaintiff. . . . We think the circumstances of this case are not such as to justify the application of the doctrine of *Davies*

v. Mann and kindred cases, and that the plaintiff's negligent act must be held to have directly contributed to the injury."

It will be readily seen from the above quotation that the case referred to is authority for, rather than against the plaintiff in the suit at bar. It, in fact, reaffirms the so-called doctrine of the last clear chance, which has been established in this jurisdiction by the case of Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225.

In the Michigan case, indeed, just cited, the evidence showed that the turning across the track was a contributing and proximate cause of the injury, and that unless the plaintiff had turned across the track, no accident would have occurred. In the case at bar, however, there is evidence which tends to show that the accident would have happened whether the plaintiff had turned across the track or not.

The case of Boerth v. West Side R. Co. 87 Wis. 288, 58 N. W. 376, is also not in point. In that case, to use the language of the opinion, "the evidence on the part of the defendant is to the effect that the wagon in question was at the time being driven on the southerly side of the avenue from Ninth street to Eighth street, by the side of the car or a little ahead of it; that upon reaching Eighth street the plaintiff's team suddenly turned north on Eighth street, immediately in front of the car, and had nearly crossed the railroad track when the wagon was struck as mentioned. The evidence seems to be overwhelming that the bell was repeatedly sounded while the car was going from Ninth to Eighth street." "If such were the facts," the court said, "then there was no negligence on the part of the defendant, but there was gross negligence and carelessness on the part of the plaintiff." It will be seen, indeed, on examining the opinion, that the accident would not have happened if it had not been for the turning across the track. The court also took the position that the bell and gong were sounded, while in the case at bar there is evidence to the contrary. We might also add that the doctrine of the last clear chance, as promulgated in North Dakota in the case of Acton v. Fargo & N. Street R. Co. *supra*, never seems to have been recognized in Wisconsin. See Owen v. Portage Teleph. Co. 126 Wis. 412, 105 N. W. 924, 19 Am. Neg. Rep. 612; Watermelen v. Fox River Electric R. & P. Co. 110 Wis. 153, 85 N. W. 663; Johnson v. Superior Rapid Transit Co. 91 Wis. 233, 64 N. W. 753.

The case of McCormick v. Ottumwa R. & Light Co. 146 Iowa, 119, 124 N. W. 889, has also been misunderstood by counsel for appellant. It is not a case, as he states, which is parallel with the one at bar, and in which the plaintiff was in the zone of danger during the whole of the time that he was upon the street. The court said: "It also appears from the testimony that plaintiff's eyesight and hearing are both defective; that he did not, after coming into Court street, look to the rear and south again until he was struck by the car, and that he traveled north from 900 to 1,000 feet after getting onto Court street. Had he looked back at or near the point where he was struck, he could have seen a car for a distance of at least 900 feet. He was not struck at a street crossing, but at a point between Ottumwa street and Maple avenue, *and had he continued driving north on the east side of the street railway he would have been in no danger from either car.*"

The same is true of the case of Tognazzi v. Milford & U. Street R. Co. 201 Mass. 7, 21 L.R.A.(N.S.) 309, 86 N. E. 799, also cited by counsel for appellant, although in this case there is evidence that just prior to the accident the plaintiff was in the zone of danger. The court said: "The plaintiff testified that as he went from North street into East Main street, across the railroad track, he stooped over or leaned out of his wagon and looked both sides to see if a car was coming, but did not see any. . . . After he had crossed the track into East Main street, he drove along nearly parallel to the track, at first in about the center of the street or 10 feet from the track, and the last part of the way about 2 or 3 feet from the track. . . . He drove along until he got opposite the driveway that led into his premises, when he turned sharply at right angles and crossed the track to go into the driveway. The car struck the *hind* wheel of his wagon before he got across the track. . . . From North street to the driveway was 300 feet. And after looking as he crossed the track at North street, the plaintiff did nothing as he drove along East Main street to see if a car was coming, or as he turned to go into his driveway or as he drove across the track. He testified that he did not hear any gong or bell or car, *but there is no evidence that he listened.* To say that he did not hear is as consistent with his not listening as with his listening and not hearing. The uncontroverted evidence shows that when he turned to cross the track and go into the driveway the

car was about 160 feet away. If he had exercised ordinary precaution, and leaned out of the wagon and looked, he would have seen it. No doubt he could properly trust something to the expectation that if a car did come along, the motorman would exercise reasonable care, and would not run into his wagon. He was not justified, however, in relying altogether upon such expectation, but was bound, himself, to take proper measures for his safety. Instead of doing that, he turned squarely across the track in front of a rapidly approaching car, which was within a short distance, without taking the slightest precaution to see whether a car was approaching." There is nothing, indeed, in this case that seems either to show that the doctrine of the last clear chance was recognized by the court at all, or that the accident would have happened if it had not been for the turning across the track. So, too, the court seems to doubt that the plaintiff listened at all. It is also quite clear that had he looked after he started to turn, he could have avoided the accident. Not only, indeed, does the evidence show that the car was 160 feet away when he started to turn, but it also shows that he was almost across the track before the hind wheel of his wagon was struck.

Nor can we see the application of the case of *State use of Carey v. Cumberland & W. Electric R. Co.* 106 Md. 529, 16 L.R.A.(N.S.) 297, 68 Atl. 197. In that case the car by which the defendant was struck was an electric *freight car*, and not the ordinary street car. There was no evidence that the wagon itself was struck, or that the plaintiff, who was injured, would have been struck at all if he had remained in the wagon. "He was struck by the car while in the act of stepping down backward from the hub of the wagon wheel toward, if not upon, a railroad track but 2 feet distant from the wheel, without taking the slightest precaution to ascertain whether a car was approaching. He could have seen the car in time to save himself if he had simply turned around and looked for it." The court further said: "Counsel for appellant contended with much ability at the hearing of the appeal, that the case came within the operation of the doctrine of the last clear chance, upon the theory that the position of Carey while standing upon the hub was one of peril in which the motorman of the approaching car could, by the exercise of proper diligence, have seen him in time to have saved him from its conse-

quences by giving timely warning or stopping the car. If his position on the hub was a perilous one, as to which we express no opinion, it was not the peril of that position, certainly not that peril alone, from which he lost his life. He was not struck while standing upon the hub, but while he was voluntarily and deliberately engaged in the very negligent act of getting down backward from the hub toward the track without even looking to see if a car was coming. There is no evidence in the record tending to prove that the motorman saw or could have seen Carey start to step down from the hub of the wagon toward the track in time to stop the car before it struck him, or to give a more timely warning than the whistle which he blew."

The case of *Winch v. Third Ave. R. Co.* is also a case where there is no evidence which shows or tends to show that the plaintiff was at any time in a position of danger until he deliberately turned upon and across the track. It is true that he drove for some 50 feet along the street and in front of the car, but there is no evidence that at any such time he was in the track of the said car.

It seems to us, indeed, that the case at bar comes clearly within the rule laid down in *Acton v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, and *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 51 N. W. 781. It is also quite clear to us that in states such as North Dakota, where contributory negligence is an affirmative defense to be alleged and proved by the defendant, the doctrine of discovered peril or of the last clear chance can be urged under a general allegation of negligence in the complaint, and that the trial court did not err in so ruling. *Hanlon v. Missouri P. R. Co.* 104 Mo. 381, 16 S. W. 235; *Powers v. Des Moines City R. Co.* — Iowa, —, 115 N. W. 494; 6 Thomp. Neg. § 7466.

The petition for a rehearing is denied.

GETCHELL v. GREAT NORTHERN RAILWAY COMPANY.

(140 N. W. 109.)

Appeal — notice of abandonment — dismissal.

1. The fact that the appellant serves notice upon respondent that he will abandon an appeal is a sufficient ground for an application to this court to have such appeal dismissed, but until such dismissal is ordered by this court the appeal remains effective, and will be considered upon its merits.

Summons — service upon agent of railway company — default judgment valid.

2. Where the summons and complaint have been served upon the station agent of a railway company, and a judgment by default duly entered therein, such judgment is valid. If the railway company wishes to have said judgment reopened on the ground that the station agent neglected to forward the papers to the head office of the company, it must make application under § 6884, Rev. Codes 1905, and make and file a good and sufficient affidavit of merits.

Motion to reopen — affidavit of merits — practice.

3. An affidavit by the defendant's attorney that he has been furnished with the records of the claim department of the railway, and that, after examining said records, he has advised the railway company that it is not liable for the damages asked in the complaint, is not a sufficient affidavit of merits. Said affidavit does not show that the claim department truthfully stated all the facts of the case to said attorney. The affidavit of the attorney does not state that the company has a good defense on the merits, but is merely to the effect that the attorney has advised the company to that effect.

Opinion filed February 3, 1913.

Appeal from the District Court for Cavalier County; *Cowan, J.*
Affirmed.

Murphy & Duggan, for appellant.

An affidavit of merits is required only where application to open default is based upon excusable neglect, mistake, etc. Rev. Codes Sec. 6884.

Judgment is to be set aside where the evidence is sufficient to show

Note.—As to necessity of affidavit of meritorious defense, and necessity of showing such defense, in order to vacate a judgment rendered without jurisdiction of the person of defendant, see note in 18 L.R.A.(N.S.) 405.

to the court that no service of the summons had been made upon defendant. *Rice v. Griffith*, 9 Iowa, 539; *Martinson v. Marzolf*, 14 N. D. 309, 103 N. W. 937; *Bauer v. Union Cent. L. Ins. Co.* 22 N. D. 435, 133 N. W. 988; *Skjelbred v. Shafer*, 15 N. D. 539, 125 Am. St. Rep. 614, 108 N. W. 487; *Stubbs v. McGillis*, 44 Colo. 138, 18 L.R.A.(N.S.) 405, 130 Am. St. Rep. 116, 96 Pac. 1005; *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; *Braseth v. Bottineau County*, 13 N. D. 344, 100 N. W. 1082; *El Paso & S. W. R. Co. v. Kelley*, 99 Tex. 87, 87 S. W. 660; *Hill v. Crownover*, 4 Tex. 8; *Edrington v. Kiger*, 4 Tex. 95; *Anderson v. Sutherland*, 59 Tex. 409.

W. A. McIntyre, for respondent.

Service upon agent of railway company in charge of station and affairs of company is good service upon company. *Getchell v. Great Northern R. Co.* 22 N. D. 325, 133 N. W. 912; *Marin v. Potter*, 15 N. D. 284, 107 N. W. 970.

Applicant to have default judgment reopened must show that the judgment was taken against him through mistake, inadvertence, surprise, or excusable neglect, and a good and sufficient affidavit of merits, and a proposed answer setting forth a valid defense must be made. *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 391; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228.

Affidavit of counsel to the effect that the claim has been presented to him, and that he advised that defendant was not liable, etc., insufficient as affidavit of merits. *El Paso & S. W. R. Co. v. Kelley*, 99 Tex. 87, 87 S. W. 660; *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581; *Nichells v. Nichells*, 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73.

BURKE, J. This is the second time this case has been before us. See 22 N. D. 325, 133 N. W. 912. Briefly stated, the summons and complaint in this action were served upon the acting station agent of defendant at Langdon, North Dakota, but said agent neglected to notify the head office of the receipt of the papers, and judgment was entered against the railway by default. Thereafter, an application was made

to reopen said judgment. This application was based upon the affidavit of the said station agent, who deposes that he does not remember that said papers were served upon him; the affidavit of the chief clerk of the head office to the effect that the papers had not been received at his office; and the affidavit of the North Dakota attorney for said railway to the effect that there had been submitted to him the claim papers and investigations of the defendant's claim department in reference to the transaction out of which the cause of action arose, and that he had advised the defendant that it was not liable for the damages claimed in the complaint. This application to reopen the judgment was denied, and this appeal is from such order of denial.

(1) Respondent calls our attention to the fact that this appeal was at one time abandoned by the defendant, and asks that we consider the same dismissed. It is true that at one time notice of abandonment of this appeal was served upon the plaintiff by the defendant, and the defendant could have secured a dismissal upon proper application to this court. No such application was made, and we consider the appeal still before us, and will pass upon the merits.

(2) The respondent further insists that there was no affidavit of merits presented with the application to reopen the judgment, and that the ruling of the trial court was correct for that reason. In answer to this, the appellant insists that the judgment entered was void because of no service having been made upon defendant, and that no affidavit of merits is necessary to purge the record of a void judgment. The question resolves itself into this; Was or was not the said judgment entered void? The evidence offered is, to our minds, conclusive that the service of the summons and complaint was duly made upon the station agent. In fact, the affidavit of said agent in no place positively denies such fact. The trial court evidently reached the same conclusion. Under these facts the judgment entered was not void, but in all things regular. The service was complete when the papers were handed to the station agent, and it was not necessary to the validity of the judgment that they were received at the railroad office. See *Brown v. Chicago, M. & St. P. R. Co.* 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, 14 Am. Neg. Rep. 169; *Ord Hardware Co. v. Case Threshing Mach. Co.* 77 Neb. 847, 8 L.R.A.(N.S.) 770, 110 N. W. 551, and cases therein cited. The application to reopen this judgment must, therefore,

be made under § 6884, Rev. Codes 1905, and must be accompanied by a sufficient affidavit of merits. *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 391; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228.

(3) As already stated, no affidavit of merits was filed, but the affidavit of defendant's attorney, above mentioned, stated that there had been submitted to him the claim papers and investigations of the claim department in reference to this accident, and that he had advised the defendant that it was not liable for the damages demanded in the complaint. The defendant now insists that these allegations constitute an affidavit of merits. We do not believe the same sufficient. While the attorney for a railroad company may be in a position to make an affidavit of merits for his client, yet it must clearly appear that he has original knowledge of the facts, and is not relying upon hearsay. In this case the attorney shows that he knows nothing of the accident, excepting what was reported to him by the claim department. He did not know whether or not said department had truthfully stated the facts to him. Further, the said affidavit does not state that the defendant is not liable, it merely states that the said attorney has advised said company to that effect. There are other objections raised to the sufficiency of the affidavit that are plausible, but we believe the two objections above set forth are sufficient for the purposes of this opinion.

It follows, therefore, that the order of the trial court denying leave to reopen the judgment was proper, and it is accordingly affirmed.

HORGAN et al. v. RUSSELL.

(43 L.R.A.(N.S.) 1150, 140 N. W. 99.)

Pleading — demurrer — contract — specific performance — option contract — acceptance — time, essence of contract — subsequent performance — equity in option contract.

In an action for specific performance of a contract created by the written

Note.—As to rights of third persons intervening between the taking and the exercise of an option for the purchase of real property, see note to report of this case in 43 L.R.A.(N.S.) 1150, and earlier cases collected in note in 28 L.R.A.(N.S.) 522.

acceptance of a written option to purchase, granted plaintiffs by an owner of lands, of which owner defendant procured title with full knowledge of the outstanding and unaccepted but not expired irrevocable option, it is *held*:—

(1) That defendant's rights are subject to those of plaintiffs, arising from their acceptance within the option period of the option granted them.

(2) That specific performance may be maintained against defendant, as it could have been against his grantor, the former owner of the land.

(3) The option and the acceptance are set forth and construed, and it is held that the written acceptance constituted an unconditional and unqualified acceptance of the option in accord with its terms.

(4) That the option stipulated the manner of acceptance and the period of time within which acceptance might be so made; also it embodied provisions as to performance and time of performance to be allowed the parties after acceptance of the option to purchase. As to this it is *held*:—

(a) That time within which the acceptance was to be made was of the essence of the contract; but that time within which the contract was to be performed after acceptance, not being clearly and beyond question stipulated to be of the essence of the contract, a performance attempted by a tender of payment by the purchaser, three days after the expiration of said time stipulated, is within time and valid in equity.

(b) A definite and unconditional acceptance in accordance with the manner and terms stipulated in the option is not avoided or rendered uncertain or conditional by matter contained in the acceptance concerning the method of performance, or where payment should be made, or by a demand for an abstract for which the sellers, under the terms of the option, were not obligated to furnish, where the unconditional acceptance is not qualified or made conditional upon compliance with such requests or demands concerning performance.

(c) Acceptance and subsequent performance are different matters; and where the acceptance is unconditional, suggestions or demands as to performance, not qualifying or rendering the acceptance conditional upon compliance with such demands, will not invalidate such acceptance.

(d) Such an unqualified and unconditional acceptance creates a contract of purchase and sale in which an action for specific performance will lie. Such contract is enforceable in equity, as a written contract embodying the same terms and subscribed by the seller and purchaser would be enforced.

(5) Upon acceptance in accordance with the terms of an option to purchase real estate, where the land covered thereby has been, pending acceptance and during the period stipulated within which acceptance might be made, transferred to a third party with full notice of such option outstanding and unaccepted, the same may be accepted by notice of acceptance served upon the optionor, the owner, giving the option, and thereupon the rights of the acceptor, optionee, relate back to and attach as of the date of the option, and render

the intervening rights acquired with notice subject to all rights of the option purchaser.

(6) Such rights of the optionee constitute an interest in lands enforceable in equity, though the optionor has transferred title to a third person, who accepted title with notice of the option.

(7) The performance here offered as pleaded *held* to be a substantial compliance with the contract, although the amount of an outstanding mortgage lien of record upon the premises was deducted from the amount tendered in full for the stipulated purchase price; and the fact that the deposit of such amount tendered was made subject to the order of the original owner and optionor, with notice in writing thereof served upon both optionor and defendant purchaser with notice, does not defeat the right of plaintiffs to specific performance.

Opinion filed February 5, 1913.

From an order of the District Court for McLean County, *Winchester, J.*, overruling a demurrer to the complaint, defendant appeals.

Affirmed.

Purcell & Divet and Hyland & Nuessle, for appellant.

To constitute a contract specifically enforceable by reason of offer and acceptance, the acceptance must be definite and unconditional, leaving nothing further to be done by the one making the offer. *DeJonge v. Hunt*, 103 Mich. 94, 61 N. W. 341; *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94.

The vendor must be paid, or payment must be offered at his residence. *Greenawalt v. Este*, 40 Kan. 418, 19 Pac. 803; *Batie v. Allison*, 77 Iowa, 313, 42 N. W. 306; *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385; *DeJonge v. Hunt*, 103 Mich. 94, 61 N. W. 341; *Richards Trust Co. v. Beach*, 17 S. D. 432, 97 N. W. 358.

The law fixes the time and place of payment, where contract is silent. *Batie v. Allison*, 77 Iowa, 313, 42 N. W. 306; *Mier v. Hadden*, 12 Ann. Cas. 92 (note).

On a sale of land, there is no implied obligation on the part of the vendor to furnish an abstract. *Richardson Trust Co. v. Beach*, 17 S. D. 432, 97 N. W. 358; *Stearns v. Clapp*, 16 S. D. 558, 94 N. W. 430; *Jepson v. Marohn*, 22 S. D. 593, 21 L.R.A.(N.S.) 935, 119 N. W. 988; *Donley v. Porter*, 119 Iowa, 542, 93 N. W. 574.

Provision in contract for time in which to examine abstract does not indicate a promise by vendor to furnish it, nor does it change the

rule. *Easton v. Montgomver*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280.

In order to maintain such an action, the amount due should have been tendered. *Kulberg v. Georgia*, 10 N. D. 461, 88 N. W. 87; *Rude v. Levy*, 24 L.R.A.(N.S.) 91, and note.

A mere option does not give the optionee any title. *Warvelle, Vend. & P.* p. 187; 24 L.R.A.(N.S.) 91.

McCulloch & Nelson, for respondents.

An option contract fully accepted, may be enforced by action for specific performance. *Turner v. McCormick*, 56 W. Va. 161, 67 L.R.A. 853, 107 Am. St. Rep. 904, 49 S. E. 28.

There was an unqualified acceptance. *Swiger v. Hayman*, 56 W. Va. 123, 107 Am. St. Rep. 899, 48 S. E. 839, 3 Ann. Cas. 1030; *Turner v. McCormick*, *supra*; 39 Cyc. 1238, and cases cited; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887; *Hunter v. Coe*, 12 N. D. 505, 97 N. W. 869; 36 Cyc. 761, and cases cited.

Specific performance will be decreed against the constructive trustee, and no tender is necessary. *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Frank v. Stratford-Hancock*, 13 Wyo. 37, 67 L.R.A. 571, 110 Am. St. Rep. 978, 77 Pac. 134.

The tender made is sufficient. *Shelly v. Mikkelson*, 5 N. D. 22, 63 N. W. 210; 36 Cyc. 702, and cases cited; *Newman v. Baker*, 10 App. D. C. 187; 39 Cyc. 2090, and cases cited; Rev. Codes 1905, Secs. 5219, 5255, 5268; *Damon v. Weston*, 77 Iowa, 259, 42 N. W. 187; *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938.

Defendant had full knowledge of the option, and took subject to equities. *Smith v. Bangham*, 156 Cal. 359, 28 L.R.A.(N.S.) 522, 104 Pac. 689; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Barrett v. McAllister*, 35 W. Va. 103, 12 S. E. 106; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Donnally v. Parker*, 5 W. Va. 301.

Goss, J. This is an action to enforce specific performance of a contract alleged to have been consummated by the acceptance of an option upon real estate. During the period granted by the option within which to accept the same, the optionor and owner, one Haas, sold and decded defendant the land described in the option, who purchased and took title with full knowledge that plaintiffs held a written

option to purchase such property. Plaintiffs thereafter attempted to exercise their option by service upon the former owner, Haas, of a written notice of intention to accept the option he had, previous to his transfer, granted plaintiffs. Subsequently a tender was made by depositing in a bank the difference between the encumbrances upon the land and the purchase price, and notice thereof given defendant. Plaintiffs bring this action against the purchaser, with notice to compel the transfer to them of the land involved, tendering the amount so deposited. To the complaint setting out the foregoing facts, the written option and written acceptance thereof, and written notices of tender served, defendant demurs on the grounds that the complaint does not state facts sufficient to constitute a cause of action, upon the overruling of which demurrer defendant appeals.

The first question for determination is whether there was a valid acceptance of the option granted. Upon this depends whether the option to purchase remained merely an unaccepted offer to sell, or instead by legal acceptance became changed into a valid contract of purchase and sale. The following is the option.

For and in consideration of the sum of \$1 to me in hand paid, the receipt whereof is hereby acknowledged, I hereby grant unto I. A. Smith and J. E. Horgan an option for thirty days, from the 25th day of April, 1910, to purchase, for the sum of \$1,600, the following described lands or leases situated in the county of McLean, and state of North Dakota.

Northeast quarter (N. E. $\frac{1}{4}$) of section seven (7) township one hundred forty-six (146) range eighty-two (82) upon the following terms and conditions, to wit: Said I. A. Smith and J. E. Horgan to signify his intention to take or reject the same by due notice in writing within this time above specified, and a failure to serve such notice within the time specified shall terminate this option without further action, time being the essence of this agreement.

In case said notice shall be served in due time, then thirty days shall be given in which to examine abstract, make deeds, and close sale.

Witness: Geo. M. Schudder, Emil Wendt.

John Haas (Seal.)

To the foregoing option the following was served as an intended acceptance thereof. It reads:

To John Haas:

You are hereby notified that pursuant to the option contract, a copy of which is hereto annexed and made a part of this notice, that I. A. Smith and J. E. Horgan do hereby signify their intention to take the land described therein, and herein described as follows:

The northeast quarter (N. E. $\frac{1}{4}$) of section seven (7), township one hundred forty-six (146), range eighty-two (82).

And you are further notified that the above named I. A. Smith and J. B. Horgan are ready, able, and willing to perform each and all of the terms thereof at such time and in such manner as may be designated by you, according to the terms of the said contract, and for that purpose are ready, able, and willing to deposit the sum of sixteen hundred (\$1,600) to your credit in such time and place and manner as may be designated by you, and hereby demand an abstract and deed of said land.

You will please accept or reject this proposition at once, and complete the transaction according to the terms of said contract.

Signed and dated at Washburn, McLean county, North Dakota, this 9th day of May, A. D., 1910.

J. E. Nelson,
Attorney for I. A. Smith and J. E. Horgan,
Washburn, North Dakota.

Appellant alleges the acceptance to have been conditional and to have embraced matters not included in the option, in that an abstract of title was demanded and the owner was asked to designate a time, place, and manner of deposit and performance, and to accept or reject a proposition not within the option given; and that the acceptance is equivocal, ambiguous, uncertain, and insufficient in law to constitute an unconditional acceptance of the option tendered.

It is the settled law of this state that, "before the acceptance of an offer becomes a binding contract, the acceptance must be unconditional, and must accept the offer without modification or the imposition of new terms." *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94. The

foregoing, on acceptance of an option, has the support of all authority. We may here mention that the letter set forth in the opinion in *Beiseker v. Amberson*, supra, shows the acceptor qualified his acceptance by the imposition of new terms, as to place of payment and performance, by requiring the deed to be transmitted by the optionor to a place designated by the optionee, at which place, in this state, instead of the optionor's residence in Washington, performance by delivery of the deed and payment were to be made. These facts clearly distinguish *Beiseker v. Amberson*, supra, from the facts here before us on demurrer to plaintiffs' complaint.

In option contracts, as in all contracts, acceptance is one thing, performance another and different thing; and what has heretofore been said has particular reference to the former. The cases and text-book writers distinguish, in actions for specific performance, between acceptance and performance; and the necessity for this distinction is well exhibited by the two written instruments now being considered, the so-called option and its notice of acceptance. The option itself granted "an option for thirty days . . . to purchase for the sum of \$1,600 the following described lands;" and that its acceptance should be made by plaintiffs signifying their "intention to take or reject the same by due notice in writing within this time above specified, . . . time being the essence of this agreement." This constituted a complete offer to sell within the period named. There is a stipulated method of and time within which acceptance shall be made, or the right to make acceptance shall end. And the option contract further provides, in the last paragraph thereof, in a general way, for performance after acceptance, by the stipulation "in case said notice shall be served in due time then thirty days shall be given in which to examine abstract, make deeds, and close sale." We find, then, the written offer tendered plaintiffs provides for both acceptance and subsequent performance. This is important when we consider the optionee's rights and privileges under the option, and that it would be but natural and reasonable for the optionee, inasmuch as the option concerned both its acceptance and subsequent performance, to make mention in the written acceptance of the option of some notification or offer concerning its subsequent performance. In fact, the last paragraph of the option practically invites some suggestion, offer, or notification concerning readiness, ability, time, or

manner of performance to "close sale." Such we find to have been in the minds of the plaintiffs at the time of the preparation of the notice of acceptance, as is clearly apparent from it. The first two paragraphs of this notice constitute an unequivocal, unconditional, positive, and plain acceptance strictly as stipulated for in the option. The acceptance reads: "You are hereby notified that pursuant to the option contract, a copy of which is hereto annexed and made a part of this notice, that I. A. Smith and J. A. Horgan do hereby signify their intention to take the land described therein and herein described, as follows." A more definite acceptance could not be drawn. Then we notice that plaintiffs, evidently with reference to the last paragraph of the option concerning performance, inserted in the notice the last two paragraphs referring to time, place, and manner of performance, making therein a proposition concerning the same, and terminating the instrument with: "You will please accept or reject this proposition at once *and complete the transaction according to the terms of said contract.*" It is true they "hereby demand an abstract and deed of said land," and it is equally certain that as to the abstract demanded plaintiffs had no right to demand the same, nor was the optionor, Haas, obliged to furnish an abstract. But such demand pertained not to the acceptance, but to performance after acceptance. In order for this demand to invalidate the acceptance, it must amount to a qualification or condition imposed as a part of the acceptance itself. In other words, it must amount in this case to a qualified acceptance to the effect that optionees "do hereby signify their intention to take the land described therein, provided or upon condition that optionor, in addition to a deed, furnish an abstract of title to said premises." Such is not the construction to be placed upon the acceptance, nor was it the intent of the optionees to make the acceptance conditional upon the furnishing of an abstract. On the contrary the acceptance was specific, certain, and unconditional. The demand for an abstract was made in reference to what should happen during the thirty-day period after the option became, as it did, a contract of sale, and as to performance during said period of said executory contract. In support of our conclusions we quote the following from the conclusion of the opinion in *Turner v. McCormick*, 56 W. Va. 161, 67 L.R.A. 853, 107 Am. St. Rep. 904, 49 S. E. 28, where the rule is laid down

that "acceptance of the formal and carefully prepared option of sale of land within the time by it allowed and according to its terms, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance, and converts the option into an executory contract of sale, provided the request be not so worded as to limit or qualify the acceptance." Consult also *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249, to the effect that "where a written proposal for the sale of land, sometimes called an option, is dependent merely upon acceptance within a fixed time, upon such acceptance and notice of it to the proposer, within the time, an executory contract is formed with mutual obligations on the parties as in other contracts." This portion of the case is fully passed upon in an opinion from the supreme court of Iowa, by Justice Deemer, in *Breen v. Mayne*, 141 Iowa, 399, 118 N. W. 441, at page 413, from which we quote: "The only fixed rule regarding the manner of the exercise of an option under a contract granting it is to discover from the language of the instrument, construed in the light of competent parol testimony, the intent of the parties with reference thereto. It may be that, under the terms of a given option, the only proper and binding method of election or acceptance is by the payment or a tender of the purchase price. On the other hand, there are many cases where the option may be exercised in parol or by any other method indicating an election to take the land; the payment of the purchase price and the making of the deed being subsequent matters in performance of a binding contract. In the one case there is an election to sell upon payment of the purchase price, which is a condition precedent to the foundation of the contract; and, on the other, there is an election to take the land upon the terms proposed, payment of the purchase price being a condition subsequent, or rather the performance of an executory contract theretofore entered into. It is important in such cases to distinguish that which pertains to the performance of a contract from that which pertains to its making. To make any sort of a contract, there must be a meeting of minds upon a given subject. An offer without acceptance is not a contract; and as a rule the acceptance, to be binding, must be in accord with the terms of the offer, and not in some other manner. In other words, the party making the offer may prescribe the method of acceptance, and to constitute a binding contract this method must

be followed." Citing *Watson v. Coast*, *supra*; *Pom. Contr.* § 387; *Minneapolis & St. L. R. Co. v. Cox*, 76 Iowa, 306, 14 Am. St. Rep. 216, 41 N. W. 24; *Bundy v. Dare*, 62 Iowa, 295, 17 N. W. 534; *Lockman v. Anderson*, 116 Iowa, 236, 89 N. W. 1072; *Myers v. Stone*, 128 Iowa, 10, 111 Am. St. Rep. 180, 102 N. W. 507, 5 Ann. Cas. 912. See also note to *Litz v. Goosling*, 21 L.R.A. 127; and 39 Cyc. 1243, from which we quote: "Acceptance within the time specified of an option to purchase land, and compliance with the conditions if any, changes the option into a contract of sale, binding upon both parties." Citing many authorities.

In the words of *Watson v. Coast*, 35 W. Va. 463, at page 473, 14 S. E. 249; "Having thus a contract, it simply remained for the parties or the law to execute it according to its terms, and so far as it does not prescribe, as prescribed by law; and the matter of payment is in this case as in ordinary cases of executory contract. The covenant or obligation to pay and that to pass title are mutual and dependent; and one cannot be required before the other is ready to be performed. *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Roach v. Dickinson*, 9 Gratt. 154; 3 *Pom. Eq. Jur.* § 1405." Had Haas remained the owner until after the acceptance of the option given by him to plaintiffs, we would have had, arising from such acceptance of the option given, an executory contract of sale in all respects the same as though it had been an ordinary contract of purchase and sale of lands upon the same terms and subscribed by both parties, owner and optionee; which, then, would have called for a deed upon the payment of the purchase price of \$1,600 within the thirty-day period of time stipulated 'in which to examine abstract, make deeds, and close sale.'"

On the contention of this defendant the question now arises as to whether the acceptance of the option, after the transfer by deed to this defendant, who under the pleading had "full knowledge of said contract" and of its subsequent acceptance, passes any right or estate to plaintiffs. Defendant contends that the option, unaccepted at the time of the sale, amounted only to a mere offer to contract, and pass no right to make subsequent acceptance, or to the land itself; that the offer was wholly executory and prospective, and could not amount to a right or interest in the land enforceable in equity. This appears plausible, but does not have the support of authority. This is well summarized

in *Smith v. Bangham*, 156 Cal. 359, from page 365, 28 L.R.A. (N.S.) 522, 104 Pac. 689, of which we quote, concerning the said question: "It has been said that an option to purchase land does not, before acceptance, vest in the holder of the option an interest in the land. *Richardson v. Hardwick*, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213; *Gustin v. Union School Dist.* 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723. On the other hand, there are cases holding that the grant on a valuable consideration of an option to purchase constitutes the grantee the equitable owner of an interest in the property. *House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Telford v. Frost*, 76 Wis. 172, 44 N. W. 835; *Wall v. Minneapolis, St. P. & S. Ste. M. R. Co.* 86 Wis. 48, 56 N. W. 367. At any rate the option vests in the grantee the right or privilege of acquiring an interest in the land, and when accepted entitles him to call for specific performance. *Hawralty v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *People's Street R. Co. v. Spencer*, 156 Pa. 85, 36 Am. St. Rep. 22, 27 Atl. 113; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580. Such right, when exercised, must necessarily relate back to the time of giving the option, (*People's Street R. Co. v. Spencer*, *supra*), so as to cut off intervening rights acquired with knowledge of the existence of the option. A subsequent purchaser, with notice of a valid and irrevocable option, would certainly take subject to the right of the option holder to complete his purchase. *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526." To which we may add the note to *Smith v. Bangham*, *supra*, also reported in 156 Cal. 359, 104 Pac. 689, found in 28 L.R.A. (N.S.) at page 522; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, 1 Ann. Cas. 986, and note; and 39 Cyc. 1344, reading: "It has been held that acceptance of an option takes effect on the date of the acceptance, and binds the party only to the conveyance of the property in its present condition. On the other hand, it is held that acceptance of an option and performance of the conditions entitled the holder of the option to call for performance as of the date of the giving of the option, so as to cut off intervening rights acquired with knowledge of the existence of the option," citing au-

thority. And the cases cited above as to the contrary are really not opposed to these principles. *Richardson v. Hardwick*, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213, holds merely that a written option never accepted and never amounting to a contract creates no interest in real property. In *Gustin v. Union School Dist.* 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156, the real question involved was whether the personal representative or the heir at law had the right of acceptance of an option to purchase contained in a lease; that court holding that where the deceased in his lifetime had not availed of the privilege of acceptance, it was a mere right to an interest in personal property, and not an interest in real estate and exercisable by the representative, instead of by the heir. We are here concerned with an executory contract of sale, resulting from an offer and its acceptance, and not with whether a mere right of acceptance is personalty or realty under inheritance laws. And *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723, concerned a provision in a policy of insurance requiring the insured to be the sole and unconditional owner in order to have an insurable interest under the policy; and is in no way an authority on the question before us. The authorities seem to be unanimous to the effect that, upon acceptance, the right of the purchaser relates back to and attaches as of the date of the option, and with the same effect as to intervening adverse parties with notice of the option as though the contract had been completed by an immediate acceptance of the option given.

Appellant claims that if plaintiffs have made a valid tender of payment under the terms of the option, it was too late, as notice of acceptance of it was given May 21st, and notice of tender and demand for deeds was not served upon Haas and Russell until June 23d, on the third day after the expiration of the thirty-day period in the option contract for closing the sale. In this connection, defendant claims that this time provision was of the essence of the option contract according to its terms. We do not so construe it. The essential provision as to time is contained in the second paragraph of the option, requiring Smith and Horgan "to signify his intention to take or reject the same by due notice in writing within this time above specified; and a failure to serve such notice within the time specified shall terminate this option without further action, time being the essence of this agree-

ment." Then comes the thirty-day provision for closing the sale. The time provision concerning which it was stipulated that time was the essence of the agreement related to the time within which acceptance of the option should be made. See §§ 389-402 of Pomeroy on Contracts and Specific Performance, second edition. The authority distinguishes between time as material to and the essence of a contract, and clearly draws a distinction here applicable. We are now dealing not with an option contract, but with specific performance of an ordinary contract of purchase and sale of land. We quote from § 392 of Pomeroy on Contracts. "In order that time may be essential from the express provisions of the agreement, the intent to make it so must be most clearly, unequivocally and unmistakably shown by the stipulation. The prescribing a day at or before which, or a period within which an act must be done, even with a stipulation that it shall be done at or before the day named or within the period mentioned, does not render the time essential with respect to such act. It has been so held with reference to a stipulation for the payment of the price or execution and delivery of the deed." Then, again, from § 399, we quote: "Much confusion has undoubtedly arisen in the minds of both judges and text writers in failing to distinguish between the rules of time as essential and the rules pertaining to time considered as material. In judicial opinions which profess to deal with time as of the essence of the contract, we may find long discussions upon the effect of unreasonable delay, and what circumstances will excuse the delay; whereas, if time is of the essence, no question of delay or of laches, using these words with any regard to their true meaning, can properly arise. If time is essential, the stipulation of the contract must be exactly complied with; not the delay, but failure to perform at the exact day, cuts off the rights of the defaulting party." We cannot say that clearly, unequivocally, and beyond all doubt these parties have stipulated that time shall, in the strict sense, be considered as of the essence of the agreement concerning the closing of this deal. It is clear that concerning the option period for acceptance allowed, that time was intended to be and was made of the essence of the agreement as to acceptance.

Respondent contends, further, that "as a condition of the right to maintain this action, the amount due should have been tendered," and that the defendant, if obligated to perform for Haas, also became sub-

rogated to Haas's rights," and as a condition of conveyance was entitled to receive in his own hand the purchase price." And also defendant claims that specific performance cannot be enforced against this defendant, because an insufficient amount, \$950, instead of \$1,600 was deposited and is brought into court as the cash to be paid in performance of this contract over and above a \$650 mortgage lien upon said premises. The complaint pleads the mortgage as a subsisting lien upon said real property, and that it was mutually agreed between Haas and the plaintiffs, upon the signing of Exhibit A, that, in case of acceptance, performance of the contract should be had by the payment of the amount of the purchase price in excess of such mortgage upon the land; that after acceptance, and on June 23d, the plaintiffs deposited in the First State Bank of Underwood, North Dakota, the sum of \$950, being the balance of the purchase price under said contract, and on said day served a notice of tender and demand for deed upon both Haas and defendant Russell, and on their respective attorneys, making such demand a part of the complaint. That plaintiffs are ready and willing to pay defendant this sum, \$950, "being the balance of the purchase price after assuming said mortgage for \$650, as hereinbefore set forth, and now bring the same into this court for that purpose," and ask for a conveyance subject to the mortgage and for general equitable relief. The notice of tender recited the deposit in said bank of the sum of \$950, on the day stated, "to the credit of and payable to the said John Haas; that the said sum of \$950 is deposited therein as a tender of the full amount due the said John Haas under and by virtue of an option contract," describing the one in suit and demanding a deed to the land "according to said option contract in return for the payment of said sum of money."

As to the right of plaintiffs to specific performance against defendant, we consider it is settled by *Hunter v. Coe*, 12 N. D. 505, 97 N. W. 869, as authority for the maintenance of this action against Russell without joining Haas, and as placing defendant in the shoes of Haas for all purposes. We quote from page 511 of the opinion: "It is well settled that one who takes a deed of land, with knowledge of an outstanding contract or title, takes it subject to such contract or title. The purchaser with notice merely stands in the place of his vendor, and may be compelled, in an action of specific performance, to convey upon the

terms of the outstanding contract. . . . Where a contract has been entered into for the sale of property, and that property is afterwards aliened or assigned, or contracted to be aliened or assigned, and the alienee or assignee has notice of the original contract, he is liable to its performance at the suit of the purchaser." In the case cited Coe had, subsequent to the making of the contract for sale to plaintiff sued upon, deeded the land to McDevitt. Concerning the order of the lower court that the purchase price on performance decreed to be paid by Hunter should be paid to Coe, the court says: "In the first place, the judgment provides that the plaintiff shall pay to Coe the unpaid purchase price of \$475. This is clearly erroneous. There is nothing due to Coe. He transferred all his title and interest to the defendant McDevitt, and was succeeded by him as the holder of the legal title. Coe cannot transfer the title, because he has none, having parted with it by the delivery of a deed to the defendant McDevitt. Under his contract with the plaintiff, Coe was to receive \$475 for the land. He has in fact received \$525 for the conveyance of the title to the defendant McDevitt. We are not able to understand on what theory Coe should be rewarded for his duplicity by being paid for the land twice. . . . McDevitt, having obtained the legal title with constructive notice of the plaintiff's contract, is bound by it, and may be compelled to convey to the plaintiff. . . . He is bound to perform the contract which his grantor was bound to perform by reason of the knowledge imputed to him. It is equitable that he should do so, but it is also just that the plaintiff, as a condition to obtaining McDevitt's title, shall perform his part of the obligation by paying to the defendant McDevitt, Coe's successor, the consideration which, under the contract, was to have been paid to Coe." Under the parallel circumstances here presented to those in the case cited, after the performance of the terms of the option by the service upon Haas of the acceptance stipulated for in such option to be so served upon him, a contract came into being which defendant Russell was obliged to perform as the successor in interest to Haas. As such he is presumptively entitled to the contract consideration, having the record title, and specific performance may be maintained against him. See note to *Rude v. Levy*, 24 L.R.A.(N.S.) 91. For plaintiffs to perform they must do or offer to do equity. To do so they have deposited the amount above incumbrances, and bring the same

into court as a tender to defendant. Of the tender they have notified defendant within three days of the expiration of the thirty-day period for closing the deal, time not being essential, strictly speaking, in its performance. The case stands as though this amount had been tendered defendant during said thirty-day period for performance. It is true the notice of tender recites the deposit as made to the credit of and payable to said John Haas. But the same instrument recites that it is to complete the contract and as the payment for the title. In this connection the paragraph of the complaint alleging the performance contemplated to be by the payment of this amount and the assumption of the mortgage, making in the aggregate \$1,600, is admitted by the demurrer. Defendant, having full knowledge of the contract, cannot now be heard to assert, as he does, ignorance of this contract provision concerning the mortgage; but, instead, is bound to the same extent as Haas would have been had he not transferred and this action been brought against him instead. Defendant was bound to know the contractual rights of these parties when he, in disregard of the rights of the plaintiffs, purchased, as he did, subject to them.

Our conclusions are that the acceptance was valid, and not conditional, and gave rise to an executory contract of sale of land with plaintiffs as purchasers, and subject to whose rights and with full knowledge thereof defendant has become the owner of the premises purchased; that specific performance may be had against him as could have been otherwise enforced against his grantor; that the rights of plaintiffs relate back to the date of the option given them to purchase these premises; that the performance offered was, under the terms of the contract, within time and a substantial and full compliance therewith; that the tender made was sufficient in equity, the payment required not being a method of or involved in the acceptance of the option, but only in the performance of a contract of sale of land; that any payment tendered on entry of the decree of specific performance should be adjudged to be paid to defendant Russell upon the execution and delivery by him of a deed conveying full legal title of the northeast quarter of section 7, township 146, in range 82, in this state, to plaintiffs as grantee; and that plaintiffs recover of defendant their costs and disbursements on this appeal. The order appealed from, overruling the demurrer, is accordingly affirmed, with leave granted to defendant, pursuant to his

request therefor, to answer, with trial subsequently to be had on the merits. We may add that if judgment for specific performance is finally entered it should allow defendant, should he elect to do so, to satisfy any mortgages on the land involved, and receive the full contract purchase price, \$1,600, for a conveyance to plaintiffs of the land, free of encumbrances.

CHRISTOFFERSON v. WEE.

(139 N. W. 689.)

Pleading — attack — motion — objection to evidence — demurrer.

1. When a pleading is only attacked by motion or objection to the introduction of evidence on the trial, it will be construed more liberally in favor of the pleader than when the attack is made by demurrer.

Pleading — counterclaim — cause of action — contract — recoupment.

2. Section 6859, Rev. Codes 1905, provides that an answer may contain a statement of any new matter constituting a defense or counterclaim; and § 6860, Rev. Codes 1905, requires such counterclaim to be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action;

(2) In an action arising on contract any other cause of action arising also on contract and existing at the commencement of the action.

Held, that in an action on promissory notes given on a conditional sale of real estate for the purchase price, a counterclaim attempted to be pleaded by the defendant, setting up the conditions on which defendant claimed the sale was made, which, if true, rendered the notes in suit in the hands of the payee voidable, such counterclaim comes within paragraph No. 1 of § 6860, *supra*, and hence it does not follow that the acts set up in the counterclaim must have been done or contracted to be done before the commencement of the action, and that said paragraph 1 applies to what was formerly termed a recoupment.

Amended pleading — misnomer — supplemental pleading — substantial rights.

3. A mere misnomer in designating a pleading as an amended pleading, instead of a supplemental pleading, has no effect where the substantial rights of

the parties are not affected thereby; and an additional pleading may be treated as supplemental, even though designated as an amended pleading. This is particularly so where the amended pleading was served by permission of the court and was received and retained without objection by the other party.

Uncertain pleading — motion — remedy — objections waived.

4. Where a pleading states the main facts necessary to constitute a cause of action, but omits to state some details, and is thereby rendered, to some extent, uncertain, the remedy of the other party is by motion to make more definite and certain or a demand for a bill of particulars; and when he does not avail himself of either of these remedies for more than ten months after the service of the pleading, or until a motion for judgment for lack of a reply, his right to object on grounds going to the incompleteness of the pleading is waived.

Objections — counterclaim — facts — demurrer.

5. The objection that facts pleaded in an answer intended to set up a counterclaim do not constitute a proper counterclaim in the action can only be raised by demurrer, where the subject-matter properly pleaded might have constituted a valid counterclaim.

Motion for judgment — order on — judgment — appeal — review.

6. An order denying a motion for judgment on the pleadings is reviewable on appeal from the judgment.

Counterclaim — material allegations — failure to reply — judgment.

7. Under § 6863, Rev. Codes 1905, providing that every material allegation contained in a counterclaim not controverted by reply shall, for the purposes of the action, be taken as true; and § 6864, authorizing the defendant to move, on notice of not less than ten days, for such judgment as he is entitled to upon the statements of his counterclaim in case the plaintiff fails to reply or demur thereto. It is *held* that under the facts of this case as set out in the opinion and as against any objections offered by plaintiff, when motion for judgment was made for lack of a reply, the defendant was entitled to judgment upon his counterclaims.

Opinion filed January 15, 1913. Rehearing denied February 5, 1913.

Appeal from judgment of the District Court for Ransom County;
Allen, J.

Reversed.

This is an action upon two negotiable promissory notes for \$100 each, bearing date the 6th day of April, 1907, one payable the 1st day of December, 1907, and the other the 1st day of December, 1908, with interest at 6 per cent, executed and delivered by the defendant, Ole T.

Wee, to the plaintiff, Mas Christofferson. The complaint is in the usual form, and was served on the 19th of November, 1909. The defendant answered December 13, 1909, and on the 3d of February, 1910, served an amended answer bearing date January 29, 1910. Service of the amended answer was made by leave of court. Service was admitted and the answer retained by the attorney for plaintiff without objection. This answer pleaded certain defensive matters which it is unnecessary to set forth. It was also attempted to plead two counterclaims. As these counterclaims are the subject of the disagreement of counsel they are quoted in full:

"That on or about the 6th day of April, 1907, at Lisbon, North Dakota, the plaintiff and defendant entered into an agreement for the purchase by the defendant of certain real estate situated within the north one half of northeast quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$) of section sixteen (16), in township one hundred and thirty-five (135) range fifty-seven (57) in consideration of the sum of two hundred dollars (\$200); that in pursuance of said agreement the plaintiff executed and delivered to the defendant a conveyance describing said real estate by certain metes and bounds as hereinbefore mentioned, and that defendant executed and delivered to plaintiff the promissory notes sued upon in this action; that it was then and there understood by the parties that the said land had been surveyed, that a plat thereof had been made and filed for record, and that it was also understood and believed by the parties as a part of said agreement and as one of the facts which induced the defendant to enter into the same, that the conveyance which plaintiff executed and delivered to him sufficiently described the premises purchased, and to entitle it to be recorded, and that it would be accepted by the register of deeds of said Ransom county for record, and recorded by him without any further act on the part of the defendant, or without further expense to him, and without the necessity of any survey or plat of said premises so conveyed.

"That in fact no survey of said premises had been made, no plat thereof was of record, and the description of said premises in said deed was not sufficient to designate the premises conveyed, or to entitle said deed to be recorded, and to require the register of deeds to record the same.

"That defendant did thereupon present said deed to said register of

deeds for record, who refused to accept or record the same on account of the insufficient description of said premises, and because no survey of the premises conveyed had been made and no plat thereof was filed or of record.

"That thereupon defendant immediately communicated such facts to plaintiff, and that plaintiff and defendant agreed and did by mutual consent rescind and cancel same; that plaintiff delivered to defendant said promissory notes, and defendant delivered to plaintiff the said conveyance.

"That thereafter, plaintiff returned said conveyance to defendant, so that he might present the same to said register of deeds again, and endeavor to have same recorded; and that at the same time defendant returned said notes to plaintiff to be held by him upon the understanding and agreement that *said notes should be surrendered upon the return of said conveyance, if the same were not recorded by said register of deeds*; that said defendant again presented said conveyance to said register of deeds for record, who again refused to record same, and that defendant notified plaintiff of such fact, and offered to return said conveyance to him for cancelation upon condition that plaintiff surrender said notes; which plaintiff refused to do; and that the consideration for said notes had failed.

"That defendant has at all times been ready, willing, and able to return said conveyance, and has offered to do so in many occasions; but that plaintiff has refused to return said notes to him; and that notwithstanding the refusal of plaintiff to return said notes in accordance with his promise, defendant has on many occasions offered and tendered plaintiff the amount due upon said notes, upon condition that plaintiff survey and plat said land, or cause said deed to be recorded; that defendant offers to surrender up the said conveyance for cancelation upon rescission of said agreement, or to execute and deliver to the plaintiff a reconveyance of said premises, as the court shall direct.

"Further answering said complaint, and as a counterclaim to the plaintiff's cause of action, defendant alleges and shows to the court:

"That at the time of the delivery of the promissory notes described in the complaint to the plaintiff, the plaintiff delivered to the defendant the conveyance of the premises hereinbefore mentioned which defendant **was to present** to the register of deeds of said Ransom county for

recording, and plaintiff then stated and represented to defendant that he would receive and hold said notes by way of earnest or pledge *for the return and cancelation of the said conveyance in case the same was not recorded for any reason*; that defendant relying upon said statements, representations, and promises, and not otherwise, delivered said notes to the plaintiff; that said statements, representations, and promises were false and fraudulent, and were made for the purpose of deceiving defendant and inducing him to deliver said notes to the plaintiff and to take said conveyance, and without any intention upon the part of plaintiff of carrying out said promises.

"That defendant did present said conveyance to the register of deeds for recording, but said register of deeds refused to record same, and that defendant offered to return said conveyance to plaintiff and demanded a return of said notes.

"That plaintiff refused and still refuses to return said notes to defendant, or to cancel the same; that said defendant is able and willing to return said conveyance to plaintiff, and now offers to do so, or to surrender the same up for cancelation, or to execute a reconveyance if the court shall so direct."

No reply was made to either of these counterclaims, and on October 28, 1910, the statutory time within which plaintiff might reply having long before expired, defendant submitted a motion for judgment on the counterclaims for failure to reply or demur thereto. Plaintiff appeared by counsel on such motion, and opposed the same. From the statements of counsel for appellant, and from statements made on behalf of respondent, as well as from allegations and recitals contained in different moving papers of respondent, which it is unnecessary to notice at length, it is apparent that the only objection to the granting of said motion was based upon the ground that the counterclaims each failed to state facts sufficient to constitute a defense or counterclaim, for the reason that:

1. Said amended answer and counterclaims fail to allege that any of the acts to be done by either the plaintiff or defendant were to be done before the commencement of the action;
2. Fail to allege that any of the acts on the part of defendant alleged to have been done were done before the commencement of the action.

The court denied the motion for judgment, and granted defendant fifteen days in which to amend his pleading, on payment of \$10, costs of

motion, and stayed all further proceedings on the part of defendant in the action until the payment of such costs. The defendant elected to stand upon the counterclaims as pleaded, and neither amended the answer nor paid the costs. This order was entered October 28, 1910. Various motions were made by the respective parties at subsequent dates, which need not be noticed. The case came on for trial on the 5th day of May, 1911, at which time counsel, by stipulation, waived a trial by jury. Plaintiff testified as to the execution of the notes and that they had never been paid, and rested. Whereupon defendant renewed his motion on which the order of October 28, 1910, was entered, for judgment on the counterclaims, for failure to reply. The plaintiff objected to the granting of such motion on the ground that no notice thereof had been served upon him, and on the further ground that it was the same motion made "several months ago in which the matter was fully and finally determined at that time." The motion of defendant was denied, and plaintiff moved for judgment. His motion was granted, and the judgment entered from which this appeal is taken. Exceptions were taken and allowed to all rulings of the court adverse to defendant.

Pierce, Tenneson & Cupler, for appellant.

A failure to reply or demur to a counterclaim entitles the defendant to judgment, on proper motion. Rev. Codes, 1905, Sec. 6864; Heebner v. Shepard, 5 N. D. 56, 63 N. W. 892.

This is true whether the counterclaim is legal or equitable. Dunham v. Travis, 25 Utah, 65, 69 Pac. 468; 11 Enc. Pl. & Pr. 1035; 6 Enc. Pl. & Pr. 76.

In the absence of statute, a defendant may plead any matter of defense accruing up to time of answer. 3 Enc. L. & P. 1317; Wormser v. Metropolitan Street R. Co. 98 App. Div. 29, 90 N. Y. Supp. 714; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. 189; Rev. Codes 1905, Sec. 6860; 31 Cyc. 131; Story & I. Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671; Wrege v. Jones, 13 N. D. 267, 112 Am. St. Rep. 679, 100 N. W. 705, 3 Ann. Cas. 482; Maxwell, Code Pl. chap. 12, p. 543, note 1; Hanson v. Skogman, 14 N. D. 445, 105 N. W. 90; People ex rel. Crane v. Ryder, 12 N. Y. 433; Estes, Pl. Boone's 4th ed. 1-198; Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512.

A pleading will be upheld when it contains allegations of fact sufficient to fairly inform the opposite party of the nature of the claim against him. *Weber v. Lewis*, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 518, 66 Am. St. Rep. 674, 75 N. W. 809.

A pleading will be more liberally construed when first attacked at time of trial, by objection to the introduction of evidence. *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511; *Weber v. Lewis*, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; *First Nat. Bank v. Laughlin*, 4 N. D. 401, 61 N. W. 473.

The sufficiency of the allegations of an answer to state a defense or counterclaim cannot be raised by motion, but must be taken advantage of by demurrer. *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872.

A promise made without any intention of performing it constitutes actual fraud. Rev. Codes, 1905, Sec. 5293; *Tamlyn v. Peterson*, 15 N. D. 488, 107 N. W. 1081; *Walters v. Rock*, 18 N. D. 49, 115 N. W. 511.

A. C. Lacy, for respondent.

The granting of judgment upon *motion* is not viewed with favor by the court. 31 Cyc. 605.

And such motions are allowed, in the discretion of the court. 3 Estes, Pl. Boone 4th ed. § 4609; 31 Cyc. 617; *Bannister v. Michigan Mut. L. Ins. Co.* 111 App. Div. 765, 97 N. Y. Supp. 843; Rev. Codes, 1905, Sec. 6860; Rev. Codes 1905, Sec. 6861.

The claim of a defendant which he may offset against the plaintiff's cause of action must be one which he could enforce against the plaintiff at the time of the commencement of the suit. *Simpson v. Jennings*, 15 Neb. 671, 19 N. W. 473; *Gurske v. Kelpin*, 61 Neb. 517, 85 N. W. 557; *Kansas Loan & Invest. Co. v. Hutto*, 48 Kan. 166, 29 Pac. 558; *McKinney v. Sundback*, 3 S. D. 106, 52 N. W. 322.

Defendant's offer to return the deed he secured from plaintiff is not sufficient. A redelivery is not a retransfer. Rev. Codes, 1905, Sec. 4956; *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057.

Where defendant demands judgment on the pleadings, unless upon a money demand, it is necessary to submit proof. *Heebner v. Shepard*, 5 N. D. 56, 63 N. W. 892.

SPALDING, Ch. J. (after stating the facts). Were the counterclaims as pleaded subject to attack on the grounds stated in the objections? This court has repeatedly held that where a pleading is attacked by motion or objection to the reception of evidence on the trial, it will be construed more liberally in favor of the pleader than when the attack is made by demurrer. *Weber v. Lewis*, 19 N. D. 473, 34 L.R.A. (N.S.) 364, 126 N. W. 105; *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809; *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511. See also *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473; *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872, 6 Enc. Pl. & Pr. 276.

Section 6859, Rev. Codes 1905, provides: "The answer of the defendant must contain: . . . "2. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."

Section 6860 reads: "The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they are such as have been heretofore denominated legal or equitable or both. They must each be separately stated, and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished."

Respondent has apparently briefed this proposition on the theory that ¶ 2 of § 6860, *supra*, is applicable. Herein he is in error. The transaction set forth in the complaint as the foundation of the plaintiff's claim is the giving of the notes, and the contract for the purchase of the land was the transaction out of which the whole difficulty arose. Without the land contract there would have been no notes; hence we are of the opinion that the causes of action attempted to be set forth in the counterclaims arise out of the contract or transaction set forth in the

complaint, and that they are connected with the subject of the action, and come under subdivision 1. It does not, therefore, follow that the acts to be done by either the plaintiff or defendant must have been contracted to be done before the commencement of the action, nor does it follow that the acts on the part of the defendant alleged to have been done must have been done before the commencement of the action. The counterclaim provided for in the section of the Code quoted was intended as a substitute for both set-off and recoupment under the old procedure. Set-off could only take place in actions on contracts for the payment of money and all mutual liquidated debts or damages, and the statutes referring to set-offs refer only to mutual, unconnected debts. The principle upon which they are based is that mutual debts between the parties are extinguished either *pro tanto* or totally, thus preventing a multiplicity of suits. Paragraph 2 of § 6859, *supra*, is applicable to set-offs, while ¶ 1 applies to what was formerly termed a recoupment, and is confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought, and regardless of whether they are liquidated or unliquidated, and this right was given by the common law. 2 Estes, Pl. 3d ed. ¶ 3364, and authorities cited; 34 Cyc. 6821; Northwestern Port Huron Co. v. Iverson, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372. The authorities to which we refer are ample to sustain this proposition. Respondent cites numerous authorities which he contends sustain his position, but on a careful examination we find they all relate to independent contracts or set-offs.

Respondent urges that if, in fact, such acts were not done until after the commencement of the action, defendant should have made application for leave to serve a supplemental complaint or answer alleging the facts material to his causes of action occurring after the former pleading was made. Even if this were necessary, where the first paragraph of § 6860, *supra*, is applicable, and even if the acts attempted to be pleaded, or any of them material, were done after the commencement of the action or after the original answer was served, the legal effect of defendant's amended answer in which his counterclaims are contained is identical with the effect of the same answer had it been denominated a supplemental answer. It was served on leave of court, its due service was admitted by counsel for respondent, and it was retained by him without objection. It would be splitting hairs, if these acts were done

at a time when a supplemental answer would have been the proper technical pleading, to set this amended answer at naught simply because it is not designated a supplemental answer.

Section 6887, Rev. Codes 1905, provides that a supplemental complaint, answer, or reply, alleging facts material to the case occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made, may be allowed on motion. It will be seen from this section that the legislature has contemplated the making of a defense or the assertion of counterclaims which may have arisen after the former pleading, so the fact that the cause of action arose before or after the serving of the original answer is in this case immaterial, unless a case is presented in which the exact time when the acts were done or were to be done is a vital element. The mere misnomer in designating a pleading as an amended pleading, instead of a supplemental pleading, has no effect where the substantial rights of the parties are not affected thereby, and an additional pleading may be treated as supplemental, even though designated as an amended pleading. *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197, 49 Pac. 406; *Seevers v. Hamilton*, 11 Iowa, 66; *Howard v. Johnston*, 82 N. Y. 271; *Cincinnati v. Cameron*, 33 Ohio St. 336; 21 Enc. Pl. & Pr. 13.

Now as to the objections to the counterclaims as pleaded. Unquestionably there are many causes of action in which time is of the essence and should be stated, but this pleading does not disclose such a condition or necessity. The mere pleading in the form that it is pleaded, that these acts had been done, and all in connection with the giving of the notes, or growing out of their execution and delivery, in itself shows that they could not have been done earlier than the notes were given nor after the amended answer was served. The conditions are such as to render any inference that they occurred prior to or later than such times impossible. The acts were done or were to be done, not with third parties, but between plaintiff and defendant, and as far as disclosed it was not important that any one of them should be done or an offer made to do it on any fixed date. The repeated use of the word "thereupon" implies that the act referred to followed shortly after the act or fact on which it was predicated. We are of the opinion that they state the time with sufficient certainty to render the plead-

ing immune to the objection made. The answer setting up the counterclaims stated the main facts necessary to constitute affirmative causes of action existing at the time the answer was served; and if the plaintiff deemed it too uncertain or too indefinite as to time or other necessary ingredients to raise a clear issue, his remedy was by motion to make more definite and certain, or by a demand for a bill of particulars; and not having availed himself of either of these remedies, for a period of more than ten months after the answer containing the counterclaims was served, or until the motion of defendant for judgment, he had waived his right to object on the grounds stated, even if time should have been more definitely pleaded. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473; 19 Enc. Pl. & Pr. 761; *Puffer v. Lucus*, 101 N. C. 281, 7 S. E. 734. See also *Stensgaard v. St. Paul Real Estate Title Ins. Co.* 50 Minn. 429, 17 L.R.A. 575, 52 N. W. 910, and *Noble Twp. v. Aasen*, 8 N. D. 77, 76 N. W. 990. We hold, therefore, that plaintiff's objection was not available in the form and at the time made.

Neither of the objections raised any question as to the facts pleaded constituting a proper counterclaim in this action (if well pleaded), and as this could only have been raised by demurrer it is unnecessary to pass upon such question. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473; *Noble Twp. v. Aasen*, 8 N. D. 77, 76 N. W. 990.

Numerous other objections to the counterclaims are now for the first time raised. They need not be specified as they are covered by our answer to other contentions of respondent, or were waived by not including them in his objections to the pleading in the trial court. *First Nat. Bank v. Laughlin*, *supra*. We conclude that the court erred in sustaining respondent's objections, on the grounds stated.

The order denying appellant's motion is reviewable on appeal from the judgment, under § 7226, Rev. Codes 1905.

The defendant was entitled to judgment upon his counterclaims on his motion submitted October 28, 1910, as against any objection made or considered by the trial court.

Section 6863, Rev. Codes 1905, provides for a reply to a counterclaim. Section 6878 provides that every material allegation contained in a counterclaim not controverted by a reply shall, for the purposes of the action, be taken as true; and § 6864 authorizes the defendant to

move, on notice of not less than ten days, for such judgment as he is entitled to upon the statements of his counterclaim, in case the plaintiff fails to reply or demur thereto within the time prescribed by law. These provisions are directly in point, and were authority for the motion submitted October 28, 1910, by defendant for judgment upon the counterclaims. See also *Power v. Bowdle*, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; *Heebner v. Shepard*, 5 N. D. 56, 63 N. W. 892; *Noble Twp. v. Aasen*, 8 N. D. 77, 76 N. W. 990; *Dunham v. Travis*, 25 Utah, 65, 69 Pac. 468; *Jarvis v. Peck*, 19 Wis. 74; *Moyer v. Gunn*, 12 Wis. 386. In the absence of some reason in this instance for requiring evidence to be submitted, the defendant was entitled to judgment. His motion was not denied on the ground that the court, in the exercise of any discretion vested in it, desired to hear evidence, and the nature of the counterclaims was not such as to make the submission of evidence necessary to the entry of judgment, as might be in the case of an accounting or assessment of damages.

The foregoing are all the questions necessary to be decided upon this appeal. The judgment of the District Court is reversed, and it is directed to enter a judgment in appellant's favor canceling the notes in controversy upon his depositing in that court a deed, properly executed, conveying to the respondent the premises described in the deed set out in appellant's answer. The appellant will recover his costs.

PUTNAM v. PROUTY.

(140 N. W. 93.)

Written contract — contemporaneous agreement — proof of — evidence.

1. Plaintiff and defendant entered into a written contract, whereby the former turned over to the latter certain farming lands, stock, and machinery in Eddy county under an arrangement by which defendant was to farm the land, and feed and care for the stock, at his own expense, for a period of

Note.—For note on question of parol evidence to show intention of parties to written contract, see 17 L.R.A. 273.

three years, for a certain portion of the crops and of the stock and increase thereof. Plaintiff also therein agreed to sell to defendant five horses, two colts, and certain farm machinery for the sum of \$800, one third to be payable each fall thereafter, but the title to such property was reserved in plaintiff as security for the payment of such purchase price, as well as security for defendant's faithful performance of all the conditions of such contract.

In April, 1907, plaintiff commenced this action in claim and delivery to recover the possession of all the personal property which he thus agreed to sell to defendant, and also certain other stock, grain, and hay, basing his right to the possession thereof upon defendant's alleged failure to fulfil the terms of the contract, either to properly feed and care for said stock, or to pay for the horses, colts, and machinery as he agreed to do. At the trial, defendant was permitted, over plaintiff's objection, to show a parol stipulation by plaintiff, at the time the written contract was made, to the effect that he would furnish certain buildings for housing such stock, and a breach thereof.

Held, that such proof was competent.

Contract — construction — incomplete instrument — separate oral.

2. The stipulation in the written contract that defendant shall "feed and care for said stock at his own expense" construed and *held*, under the circumstances, not intended to cover the subject of providing buildings for housing such stock, and that the proof of the parol stipulation on plaintiff's part to furnish buildings for such purpose in no manner tended to change, contradict, or vary the terms of the written contract. The general rule, as prescribed in § 5333, Rev. Codes 1905, that "the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument," does not preclude proof of the existence of any separate oral stipulation or agreement as to any matter on which the written contract is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.

Jury — instructions — prejudicial error — material issues.

3. The instructions of the court to the jury examined and *held* insufficient for the reason that they wholly fail to instruct as to the law of the case in any essential particular, and such instructions were also prejudicial on the ground that they were well calculated to mislead and confuse the jury.

4. While it is not reversible error to omit to instruct on some particular point, but which point is covered in a general way in the charge, in the absence of a request so to do, still a total failure to instruct upon the essential and controlling issues in controversy constitutes prejudicial error.

Opinion filed February 5, 1913.

Appeal from District Court, Eddy County, *E. T. Burke, J.*, presiding at the trial, and *J. A. Coffey, J.*, presiding on the motion for new trial.

Action by S. N. Putnam against A. B. Prouty. From that portion of the judgment in defendant's favor adjudging him to be entitled to the possession of certain personal property, or the sum of \$700 the value thereof, in case a delivery cannot be had, and also adjudging him entitled to damages in the sum of \$1,400, together with the costs and disbursements; and also from an order denying his motion for judgment notwithstanding the verdict or for a new trial, plaintiff appeals.

Reversed and a new trial ordered.

The action is in claim and delivery, and at the commencement thereof all of the property described in the judgment appealed from was taken into plaintiff's possession, where it has remained ever since, the defendant not rebonding such property.

The litigation arises over a dispute as to the rights of the respective parties under the following agreement:

This agreement, made in duplicate, and entered into this first day of December, A. D. 1905, by and between A. B. Prouty, of the first part, and S. N. Putnam, party of the second part and owner of the real estate and personal property hereinafter mentioned,

Witnesseth, That the party of the first part rents of the party of the second part for a period of three years from date, *i. e.*, from December 1, 1905, to December 1, 1908, the following described lands and premises, to wit: The S. E. $\frac{1}{4}$ of sec. 32, twp. 149, r. 65; the N. E. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of sec. 6; the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and lots 1, 2, 3, 4, 5, in sec. 6; also the S. E. $\frac{1}{4}$, sec. 6, all in township 148, range 65, in Eddy county, N. D., or so much thereof as said first party can and does farm in a good and husbandlike manner.

The party of the second part shall furnish all seed for sowing said land, pay \$50 per year towards the cost of twine, and pay 2, 4, and 8 cents respectively for the threshing of his one half of the oats, wheat, and flax raised on said land.

The party of the first part shall do all work necessary in the raising of said crops, including the plowing, sowing, harvesting, and threshing

said grain, and pay all expenses attended thereto except as heretofore provided, and shall put all grain into the granary. And upon demand by first party after he shall have fulfilled his part of the contract, the second party shall deliver to him the one half of all grain so raised on said land. There being 120 acres of land now plowed and ready for crop on said land, acres of corn fodder unhusked and 50 tons of hay on said premises, it is hereby agreed that the first party shall, December 1, 1908, have on said premises the same No. of tons of hay in stack, the same No. of acres of unhusked but harvested corn, all of which shall be turned over to said second party as a condition precedent to the fulfilling of this contract on the part of the first party herein. All hay put up by first party during the time of this lease on said land shall be divided as follows: Two thirds to first party and one third to second party. All fenced pasture on said land shall be for the exclusive benefit of the first party, and the pasture adjoining in township 148-66 shall be used jointly by first and second parties, first party to make all necessary repairs and keep all fences in as good condition as at the date of this lease.

There being now 34 head of cattle on said premises, said first party is to feed and care for said stock at his own expense and on said premises for said term of three years, at the end of which time, as compensation therefor, said second party agrees to deliver to first party the one half of all increase of said stock and the one third of the original herd, and should second party dispose of any of said stock prior to the expiration of this term, he shall pay first party in proportion to the time said stock has been kept by first party.

There being now 22 hogs on said premises, first party shall take all care of them, including the cultivation of at least 6 acres of corn for feed (all other feed except corn to be furnished by second party), and as compensation therefor he shall have one third of all hogs and one third of the increase thereof.

Twelve sheep being on said premises, first party agrees to care for them, feed them, and provide all things necessary for their maintenance, and as compensation therefor he shall have one half of all increase, and one half of the wool from said sheep.

Said first party, desiring to have and purchase certain personal property belonging to second party, has given his promissory note to second

party for \$800, to be paid as follows: "One third in one year, one third in two years, and one third in three years. When said note is paid in full, with interest, and all other conditions of this agreement are fulfilled as herein provided, said first party shall be the owner of the following described property: Two roan horses about thirteen years old, named Pete and Harry; one gray mare, named Flora, about nine years old; one brown mare about fourteen years old, named Daisey; one brown mare, named Maude, three years past; 1 Deering binder, 1 McCormick binder, 1 Kentucky drill, 1 gang plow, 1 mower, 1 rake, 1 disc. All of said property of every description being in the possession of and owned by second party to this contract till said conditions are fulfilled. Subject to proper use by first party.

A. B. Prouty,
S. N. Putnam,
Party of the second part.

The evidence discloses that defendant went into possession of the lands and personal property under said agreement, and remained in possession until the commencement of this action, April 3, 1907. At the time such action was commenced, there was due on the \$800 note one instalment amounting to one third of the principal, but the defendant contends that he was entitled to credit upon said note for an amount at least equal to such first instalment; and the testimony on this issue is in conflict, the plaintiff contending that defendant was entitled to a credit of only \$125.

The evidence discloses, without dispute, that in January, 1907, the 34 head of cattle were in a very deplorable condition, caused either by a lack of proper food or shelter; it appearing that out of the 34 head 17 died, and that their death was caused either by freezing or starving, defendant's contention being that their death was caused through the fault of the plaintiff in not providing a proper building for housing them. It is a conceded fact that, upon discovering the condition of such cattle, defendant voluntarily permitted plaintiff to take them into his possession, and remove them to a suitable place. A large mass of testimony was introduced relative to the condition of the cattle in January and to the cause thereof.

It is plaintiff's contention that, by the terms of the contract, the

title and right to the possession of all the personal property, including the cattle, horses, and farm machinery, was held and retained by him as security, not only for the payment of instalments due on the \$800 note, but also for the performance of all other conditions of the contract including proper care and provision for the cattle. Defendant seeks to exonerate himself from liability on account of the condition of the cattle, by seeking to show that plaintiff undertook and agreed to furnish suitable buildings for housing the same, and that he failed and neglected to do so, and that he, defendant, by the use of his best efforts, was unable to so care for the cattle as to prevent the loss and serious injury thereto as aforesaid. The testimony offered by defendant, tending to show plaintiff's agreement to thus furnish a suitable place for housing said cattle, was objected to upon the ground that it tended to change, add to or enlarge the conditions of the written contract, and such testimony was received over plaintiff's objection, and exceptions were preserved to such rulings.

At the close of the entire evidence, plaintiff moved for a directed verdict, which motion was denied and exception taken. The verdict of the jury awarded to plaintiff the possession of the sheep, oats, speltz, wheat, and hay described in the complaint, but awarded to the defendant the horses, colts, harness, and farm machinery therein described, and fixed the value thereof at \$800. By such verdict the jury also assessed damages against the plaintiff, and in favor of the defendant, in the sum of \$1,400 for the detention of said property. Thereafter judgment was entered pursuant to the verdict, with the exception that the value of the property awarded to the defendant was reduced from \$800 to \$700. In due time plaintiff made a motion in the alternative for judgment in his favor notwithstanding the verdict or for a new trial, which motion was denied.

Maddux & Rinker, and S. E. Ellsworth, for appellant.

A written contract which does not express the whole agreement between the parties, in relation to the subject-matter, or is incomplete in itself, and is supplemented by a further parol contract, proof may be offered as to the parol contract, when properly pleaded. *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729; *Johnson v. Kindred State Bank*, 12 N. D. 336, 96 N. W. 588; *Bower v. Jones*, 26 S. D. 414, 128 N. W.

470; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; Merchants State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853; Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49; Anderson v. Matheny, 17 S. D. 225, 95 N. W. 911.

The court, in charging the jury, must instruct upon the material law points in the case. Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Owen v. Owen, 22 Iowa, 270; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224.

The agreement, having been in writing, supersedes all previous or contemporaneous negotiations in reference to same subject, and is controlling. Rev. Codes 1905, § 533.

The oral agreement was in effect, on alteration of the written contract, and was never executed. Rev. Codes 1905, § 5382.

James A. Manly and Knauf & Knauf, for respondent.

Oral testimony may be given to show wherein a written contract is silent. Stephen's Digest of Ev. 163; Hand v. Ryan Drug Co. 63 Minn. 539, 65 N. W. 1081; Western Lime & Cement Co. v. Copper River Land Co. 138 Wis. 404, 120 N. W. 277; South Dakota C. R. Co. v. Smith, 22 S. D. 210, 116 N. W. 1120; Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667; D. M. Osborne & Co. v. Stringham, 1 S. D. 406, 47 N. W. 409, 4 S. D. 593, 57 N. W. 776; Miller v. Way, 5 S. D. 468, 59 N. W. 467; Grand Forks Lumber & Coal Co. v. Tourtelot, 7 N. D. 587, 75 N. W. 901; Engel v. Scott & H. Lumber Co. 60 Minn. 39, 61 N. W. 825; De Rue v. McIntosh, 26 S. D. 42, 127 N. W. 534.

A part of the consideration for the contract was the contemporaneous oral agreement to furnish buildings, and extrinsic evidence was admissible to show same. 9 Cyc. 732; Dicken v. Morgan, 54 Iowa, 684, 7 N. W. 145.

FISK, J. (after stating the facts as above). Appellant has assigned ten alleged errors in this court, but he has argued only assignments numbered 1, 3, 4, 6, and 7. We shall therefore treat the other assignments as waived. Assignment number 1 challenges the rulings of the trial court in admitting oral testimony offered by defendant relative to an alleged agreement on plaintiff's part to furnish a

barn or a suitable place for housing the cattle, it being appellant's contention that, because the written contract contains a stipulation that defendant shall "feed and care for said stock at his own expense and on said premises," that such parol proof of an alleged agreement on plaintiff's part to furnish suitable buildings was wholly inadmissible, and that the ruling admitting it constituted prejudicial error. In brief, appellant relies upon the well-settled rule which is embodied in statutory form in this state, that "the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Section 5333, Rev. Codes 1905. Appellant's counsel argue that, by the terms of the written contract, defendant clearly and unequivocally agreed to "feed and care for said stock at his own expense," and that therefore an oral stipulation that plaintiff should provide a shed or building in which the cattle might be properly housed and cared for, not only varied the terms of the written contract, but in part contradicted them.

Appellant's contention is predicated upon the hypothesis that the stipulation aforesaid embraces, upon its face, the full and complete contract between the parties as to the care of the stock. We do not thus construe such clause, and we think it very apparent that the parties merely intended thereby to cover the defendant's duty under the contract with reference to furnishing the feed, and feeding as well as generally looking after such stock, but they did not intend that his duty in this respect should extend to furnishing buildings in which to house the same. Such a construction of said clause is wholly unreasonable in the light of the subject-matter of the contract, the season of the year when it was entered into, being in the month of December, and the circumstances under which and the purposes for which the same was entered into. The defendant, in a sense, became, under the contract, a mere servant of plaintiff's to cultivate his lands for a stipulated portion of the crops to be paid him by plaintiff, and to furnish feed for and to look after and care for the cattle, hogs, and sheep for a stipulated portion of the increase thereof, etc.; and it is wholly improbable, in view of all the circumstances, that it could have been the intention of the parties that defendant should supply, at his own expense, valuable fixtures or permanent improvements to plaintiff's farm

in the way of buildings in which to house said stock. It is, of course, true that such a contract, if entered into, would be perfectly legitimate and binding, but, as before stated, we do not thus construe the stipulation in question. It is a well-settled rule for construing contracts, that "while the writing itself is the only criterion by which the intention of the parties is to be ascertained, yet it is not necessary that the incompleteness thereof should appear on its face from a mere inspection of it, for it is to be construed in the light of its subject-matter and the circumstances under which and the purposes for which it was executed." 17 Cyc. 747, citing *Potter v. Easton*, 82 Minn. 247, 84 N. W. 1011; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 66 Minn. 156, 68 N. W. 854; *Eighmie v. Taylor*, 98 N. Y. 288.

In *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* supra, Mitchell, J., in speaking for the court, lays down what we deem a sound rule regarding the admission of evidence of parol stipulations not covered in the written contract, as follows: "All the authorities are substantially agreed that where, in the absence of fraud, accident, or mistake, the parties have deliberately put their contract into a writing which is complete in itself, and couched in such language as imports a complete legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto. But the point upon which the courts have sometimes differed is as to how the incompleteness of the written contract may be made to appear. Some cases seem to go to the length of holding that this may be done by going outside of the writing, and proving that there was a stipulation entered into, but not contained in it, and hence that only part of the contract was put in writing. If any such doctrine is to obtain, there would be very little left of the rule against varying written contracts by parol. Such is not the law. Other cases seem to go almost to the other extreme, by holding that the incompleteness of the writing must appear on the face of the document from mere inspection. But to furnish a basis for the admission of parol evidence the incompleteness need not be apparent on the face of the instrument. If the written contract, construed in view of the circumstances in which, and the purpose for which, it was executed,—which evidence is always admissible to put the court in the position of the parties,—shows that it was not meant to contain the whole bargain be-

tween the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but, if it shows that the writing was meant to contain the whole bargain between the parties, no parol evidence can be admitted to introduce a term which does not appear there. In short, the true rule is that the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself; but, in determining whether it is thus complete, it is to be construed, as in any other case, according to its subject-matter and the circumstances under which and the purposes for which it was executed."

Mr. Stephens in his work on Evidence, chapter 12, § 2, states the rule as follows: There may be proved by parol "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them." Judge Mitchell, of the Minnesota court, approves the above as an accurate statement of the rule, but criticizes it as being indefinite as to what are "the circumstances of the case," which the court may consider in determining the completeness or incompleteness of the document.

In *Lewis v. Seabury*, 74 N. Y. 409, 30 Am. Rep. 311, a written lease had been entered into between the parties, containing a clause that the plaintiff should make all "improvements and repairs" necessary to be made on the premises during the continuance of her term, and that such improvements and repairs should be left on the premises at the end of the term, but it contained no stipulation regarding the furnishing of fixtures by the defendant. The plaintiff was the lessee, and she sued to recover for a breach of an alleged oral contract or stipulation by defendant to furnish certain fixtures for the premises. It was insisted by the defendant that the written lease was conclusive of the contract, and precluded any evidence of an alleged oral agreement as to fixtures. In passing upon the points thus raised, it was held: "The case is undoubtedly very near the line, but I am inclined to think that such parol agreement was a separate and independent one, touching a subject not covered by the lease, and made for an independent con-

sideration paid by the plaintiff not stipulated for or referred to in the lease. The promise that certain specific fixtures then on the premises should be retained and remain there, so that the plaintiff might enjoy the benefit of it, if she took the lease, may be sustained as a previous distinct collateral agreement upon a collateral and independent consideration which did not merge in the subsequent written contract of hiring." Citing *Erskine v. Adeane*, L. R. 8 Ch. 756, 42 L. J. Ch. N. S. 835, 29 L. T. N. S. 234, 21 Week. Rep. 802; *Morgan v. Griffith*, L. R. 6 Exch. 70, 40 L. J. Exch. N. S. 46, 23 L. T. N. S. 738, 19 Week. Rep. 957; *Hope v. Balen*, 58 N. Y. 380. In addition to the foregoing, we call attention to certain provisions of our Civil Code which we deem more or less applicable. Section 5351, Rev. Codes 1905, provides: "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." Also § 5352, as follows: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

In the light of these rules, the point here in question is not difficult to decide. We think the evidence of the parol promise of plaintiff to furnish a suitable building or buildings for housing said stock was admissible, as such evidence in no manner tended to change, contradict, or vary the terms of the written contract, as the subject-matter of such parol agreement or stipulation is not and was not intended by the parties to be covered by the stipulation declaring that defendant should feed and care for such stock at his own expense. See also 17 Cyc. 720, wherein it is said: "The existence of a written lease does not preclude parol evidence of a collateral agreement between the lessor and the lessee, unless it is inconsistent with or contradictory to the terms of the written instrument. Thus it may be shown that there was an independent agreement of the lessor to make certain repairs or to provide certain fixtures, a warranty as to the condition of the premises, or a contemporaneous promise of the landlord that the adjoining premises shall not be used in a manner inconsistent with the convenient use of the demised premises."

We have examined the case of *Johnson v. Kindred State Bank*, 12 N. D. 336, 96 N. W. 588, as well as the other North Dakota authorities cited by appellant, but we find nothing therein which conflicts with

the foregoing rules. Defendant laid a sufficient foundation in his answer for proving such alleged oral agreement and plaintiff's breach thereof.

We have passed upon the foregoing point, not because we deem its decision of very material or controlling importance as to the questions involved on this appeal, but we do so in view of our conclusion that, for reasons hereafter stated, we deem it incumbent upon us to order another trial of the action. We are loath to disturb the verdict of the jury, but in view of the condition of the record we feel that there is no other alternative. The testimony, which is unnecessarily voluminous, is a veritable jumble, with no pretense of orderly or logical arrangement, while the instructions of the court to the jury are strikingly devoid of proper rules to guide the jury in disposing of the various issues submitted to it. As a necessary result, the verdict of the jury is but little more than a mere guess. It would serve no useful purpose to set out the instructions in full in this opinion. Suffice it to say that, in the main, they consist merely of a statement of the contentions of the parties as disclosed by the pleadings, followed by the statement that each party has the burden of establishing the things alleged by him by a fair preponderance of the evidence. Also a few mere cautionary instructions to the jurors to the effect that they are the judges of the facts and of the credibility of the witnesses, and giving certain general rules for determining such credibility. Then follows the statement in this language: "There is another dispute that I might call your attention to, and that is the dispute as to whether or not there was an oral contract entered into between Mr. Prouty and Mr. Putnam at the same time that exhibit A was entered into regarding the buildings and regarding the board of the men. The exact nature of that dispute you have heard, and when you are settling the other disputes it will be a part of your duty to settle the disputes regarding those different items." Also that they must find whether in the fall of 1906 the instalment due on the note had been paid, "for the reason," as stated, "that the plaintiff alleges that the note was in default at the time that he took possession of the property, and that that was the reason he took possession, . . . If the note was overdue and unpaid at that time, that is the instalment of it at least that was due. Mr. Putnam would be entitled to the possession of the property in order to enforce his lien against

his security, and that is the reason that that is material." The jury was given no light whatever to guide it in determining such questions, nor was it informed in any manner as to the effect upon their decision of a finding either way upon the existence of the alleged parol agreement relative to the furnishing of buildings by Putnam for housing said stock, although they were advised by the court that it was a material matter for them to decide. The pleadings disclose a controversy over the ownership and right to the possession of 5 horses, 2 colts, 2 binders, 1 drill, 1 gang plow, 1 mower, 1 rake, 1 disc, 12 sheep, 1,500 bushels of oats, 1,000 bushels of speltz, 200 bushels of Durum wheat, 225 bushels Fife wheat, 75 bushels flax, 3 sets of harness, and 25 tons of hay; but the instructions ignored, and in effect eliminated, everything except the five horses and machinery. The jury, however, by their verdict, found that plaintiff was entitled to the possession of the sheep, oats, speltz, wheat, and hay described in the complaint; but did not, by such verdict, determine the ownership thereof. They also found that defendant was, at the time of the commencement of the action, entitled to the possession of the horses, colts, harness, and machinery described in the complaint, and fixed the value thereof at the sum of \$800, and the damages which defendant suffered by the taking and detention thereof by plaintiff at the sum of \$1,400. The instructions wholly failed to enlighten the jury as to any rule by which they should be guided in determining such value and damages, nor were they instructed as to the law or rules which they should apply in determining whether or not the instalment due on said note in the fall of 1906 had been paid. Defendant did not contend that he ever paid the same in cash, but merely that he had a set-off thereto consisting of labor theretofore performed and board furnished to plaintiff, aggregating an amount more than sufficient to pay and satisfy such instalment.

In view of the fact that the jury, by their verdict, awarded to plaintiff the possession of the sheep, oats, speltz, wheat, and hay, he probably cannot claim prejudicial error on account of the action of the court in omitting to submit such issues to the jury, although they should have been instructed to determine the ownership of such property and also the right to the possession thereof.

The action involves merely the ownership and right to the possession of the personalty described in the complaint; and it does not occur to

us that the questions as to whether plaintiff orally agreed to furnish buildings for the stock, or as to whether the cattle died from freezing or starvation, or as to the degree of care and prudence exercised by defendant in looking after the cattle, have any materiality in so far as the right to the possession of the horses, colts, harness, and machinery are concerned. Defendant held such property under a contract to purchase the same, and his right thereto did not in any way depend upon the continuance in force of the other portion of the contract. They probably have a material bearing, however, upon the right to the possession of the other property, for if plaintiff had fulfilled his part of the contract and defendant was grossly negligent in the care of said stock, this no doubt would furnish plaintiff grounds for canceling the contract. On the contrary, if defendant was in no way at fault for the condition of said stock, no right of cancellation would exist, even though defendant may have voluntarily permitted plaintiff to remove said cattle from the farm. We might here add, in view of another trial, that even though plaintiff made the oral stipulation to furnish a new barn or buildings for the cattle, his failure so to do would not exonerate defendant from using due care, under the circumstances, to protect such stock from freezing to death. In other words, plaintiff's breach of such oral agreement or stipulation, if proved, would not necessarily constitute the sole or proximate cause of the loss of the cattle. If defendant could, by the exercise of due care, have saved such stock from dying by protecting them in some reasonable way from the extreme weather, he was required to do so.

However, on this appeal we are concerned merely with that portion of the judgment which is in defendant's favor, awarding to him the possession of the horses, colts, harness, and machinery or their value, \$800, in case a delivery cannot be had, and the sum of \$1,400 damages for the taking and detention thereof, and were it not for the reasons herein mentioned, we would feel obliged to affirm such judgment. We are agreed, however, that appellant's criticisms of the instructions as a whole are well taken. As before stated, such instructions fail to cover any of the material questions in the case as they should, and it is quite apparent that the jury was misled and confused by those which were given. While it is no doubt true, as we have held on several oc-

casions, that it is not reversible error to omit to instruct on some particular point in the case in the absence of a request so to do, still we think the law of the case should, at least in a general way, be covered to the end that the jury may receive reasonable aid and enlightenment upon the essential and controlling questions in controversy, and a total failure to thus charge will result in a mistrial, and this is especially true where, as in the case at bar, it appears at least doubtful whether substantial justice has been meted out by the verdict. See *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1; *Owen v. Owen*, 22 Iowa, 270; *Forzen v. Hurd*, 20 N. D. 42, 120 N. W. 224; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638.

The amount of the damages awarded for the detention of the property appears to be somewhat excessive; but whether this is true or not we need not here decide, for we are convinced that this portion of the verdict has no sufficient basis for its support in the evidence. Such damages are based exclusively upon the value of the use of the property between the time of the commencement of the action and the trial, and the testimony from which the finding is made is to the effect that during a portion of each of the years the horses were worth a certain sum per day. In other words, the net value of their use for each year or during the entire period is not shown. Manifestly it would be unjust to merely show the earning capacity or reasonable value of such property for a part of the time without also showing what the cost would be of feeding and caring for the same during the remainder of the period.

In view of our conclusions as above announced, we deem it unnecessary to notice the other assignments. The alleged errors therein complained of will probably not arise on another trial.

The judgment and order appealed from are reversed, and a new trial ordered.

BURKE, J., being disqualified, took no part in the above decision.

STATE v. SCHONBERG.

(140 N. W. 105.)

Trial — larceny — witnesses — property — ownership.

1. On a trial for larceny by defendant of certain feeder slats and chains belonging to M. & Co. and attached to a threshing-machine separator, the testimony to the state's witnesses disclosed that on the morning such property was stolen defendant was met upon the public highway near the place where the M. & Co. separator was located, having in his possession a bundle of slats with chains attached. The theory of the defense was that defendant procured the slats and chains which were in his possession from an old separator belonging to H. & F. by the permission of H. & F., and that they were not the property of M. & Co. At the trial M., a witness for the state, was asked on cross-examination whether the feeder on his machine could be operated without having the slats so close to each other. An objection was sustained to this question on the ground of immateriality and not proper cross-examination.

Held, that such ruling was correct.

Witness — impeachment — testimony — relevancy.

2. A question asked for the purpose of laying a foundation for impeaching a witness upon the ground of contradictory testimony given by him at the preliminary examination was properly excluded, it appearing that such question related to a subject-matter in no way germane to the testimony given by the witness at the trial.

Evidence — materiality — foundation.

3. Defendant sought to introduce in evidence a box of feeder slats which had been removed from his machine for the purpose of showing that they had to be cut off at the ends in order to fit his machine. This testimony was properly excluded as it had no material bearing upon the issue as to defendant's guilt or innocence. Nor was there any proper foundation laid for the admission of such testimony, as there was no showing that such slats were the ones which it was claimed had been stolen from the McKay machine.

Evidence — self-serving declarations — hearsay — conversation.

4. Defendant's brother was asked to narrate a conversation had with de-

Note.—While there is some conflict in the authorities as to whether the unexplained possession of goods recently stolen constitutes *prima facie* evidence of guilt, the cases seem to agree with the holding in *STATE v. SCHONBERG*, that such possession does not constitute affirmative proof of guilt, as shown in a note in 12 L.R.A. (N.S.) 199, on possession of recently stolen property as evidence of burglary.

defendant on the evening prior to the larceny, presumably for the purpose of showing that the defendant expressed to him his intention of going to Rolla to procure slats from the H. & F. feeder. Such testimony was properly excluded on the ground that it amounted to merely self-serving declarations and hearsay statements of the defendant. Any expressed intent by the defendant to his brother of his purpose that night was both incompetent and immaterial.

Testimony — rulings.

5. Certain other rulings excluding testimony offered by the defendant examined and held nonprejudicial.

Jury — instructions — larceny — possession of stolen property — guilt — inference of.

6. The court instructed the jury upon the question of the weight to be given the proof as to defendant's recent possession of the stolen property as follows: "If recently stolen property is found in the possession of the defendant within a short time after the commission of the crime of larceny, such finding is affirmative proof, under the law, that the defendant stole the property unless the defendant has explained to the jury how he came in possession of the property, so as to lead the jury to a reasonable doubt as to whether he is guilty or not guilty." The giving of such instruction was prejudicial error, as it, in effect, told the jury that they should treat such circumstance as an established fact showing guilt unless explained by defendant in a manner consistent with his innocence. The jury should have been instructed that the possession of stolen property, recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found; and whether such inference should or should not be drawn is a fact exclusively for the jury.

Arguments of counsel — instruction to ignore — error.

7. The court also instructed the jury in effect that they should, in deciding the case, ignore the arguments of counsel.

Held, following the rule announced by this court in *Zilke v. Johnson*, 22 N. D. 75, 132 N. W. 640, that the giving of such instruction was prejudicial.

Opinion filed February 11, 1913.

Appeal from District Court, Rolette County; *John F. Cowan, J.*

Defendant was convicted of the crime of petit larceny and from the judgment he appeals.

Reversed and remanded.

William Bateson, for appellant.

Before a witness can be impeached, a proper foundation must be

laid. Jones, Ev. §§ 845, 846; 1 Greenl. Ev. 16th ed. § 461; Krause v. State, 88 Neb. 473, 129 N. W. 1020, Ann. Cas. 1912 B, 736; The Charles Morgan, 115 U. S. 69, 29 L. ed. 316, 5 Sup. Ct. Rep. 1172; State v. Hughes, 8 S. D. 338, 66 N. W. 1076; Ashton v. Ashton, 11 S. D. 610, 79 N. W. 1001; State v. Hazlett, 14 N. D. 490, 105 N. W. 617; State v. Pirkey, 22 S. D. 550, 118 N. W. 1042, 18 Ann. Cas. 192; Horton v. Chadbourn, 31 Minn. 322, 17 N. W. 865; Taugher v. Northern P. R. Co. 21 N. D. 111, 129 N. W. 747.

Declarations of a party which show motive or intention, are admissible, when such question of motive or intention is material. 16 Cyc. 1184; 1 Greenl. Ev. 16th ed. § 108; 1 Greenl. Ev. § 162; Jones, § 348; Com. v. Trefethen, 157 Mass. 185, 24 L.R.A. 235, 31 N. E. 961; Viles v. Waltham, 157 Mass. 542, 34 Am. St. Rep. 311, 32 N. E. 901; Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909; State v. Hayward, 62 Minn. 474, 65 N. W. 63; Hunter v. State, 40 N. J. L. 495; State v. Dickinson, 41 Wis. 299, 2 Am. Crim. Rep. 1; State v. Hazleton, 15 La. Ann. 72, cited in Wharton, Crim. Ev. 9th ed. § 496, note 6; Mathews v. Great Northern R. Co. 81 Minn. 363, 83 Am. St. Rep. 383, 84 N. W. 101; Cincinnati, I. St. L. & C. R. Co. v. Howard, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892; Denver & R. G. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211; Lake Shore & M. S. R. Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052, 10 Am. Neg. Cas. 8.

Whether a person can read, speak, or understand English is a question of fact, which may be testified to by others having knowledge. Gibbs v. State, — Tex. Crim. Rep. —, 20 S. W. 919; Re Cross, 85 Hun, 343, 32 N. Y. Supp. 933; Wren v. Howland, 33 Tex. Civ. App. 87, 75 S. E. 894.

Possession of recently stolen property is not presumptive evidence of guilt. Tomerlin v. State, — Tex. Crim. Rep. —, 26 S. W. 214; Lee v. State, 27 Tex. App. 475, 11 S. W. 483; Oxier v. United States, 1 Ind. Terr. 85, 38 S. W. 331; State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Blaker v. State, 130 Ind. 203, 29 N. E. 1077; Stover v. People, 56 N. Y. 315; State v. Harras, 25 Wash. 416, 65 Pac. 774; Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; State v. Mandich, 24 Nev. 336, 54 Pac. 516; Metz v. State, 46 Nev. 547, 65 N. W. 190; State v. Deuel, 63 Kan.

811, 66 Pac. 1037; *State v. Hoshaw*, 89 Minn. 307, 94 N. W. 873; *State v. Rosencrans*, 9 N. D. 163, 82 N. W. 422.

All proper arguments of counsel are entitled to consideration by the jury as a part of the entire case. To charge the jury to ignore them is error. Rev. Codes 1905, Sec. 9984; *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341; *People v. Ambach*, 247 Ill. 451, 93 N. E. 310; *Reeves v. State*, 34 Tex. Crim. Rep. 483, 31 S. W. 382; *People v. Hite*, 8 Utah, 461, 33 Pac. 254; *Long v. State*, 23 Neb. 33, 36 N. W. 310; *Zilke v. Johnson*, 22 N. D. 75, 132 N. W. 640.

D. J. McLennan, State's Attorney, *Andrew Miller*, Attorney General, *C. L. Young*, Assistant Attorney General, and *Frederick T. Cuthbert*, respondent.

Assignments of error should specifically point out wherein error is claimed. *Flora v. Mathwig*, 19 N. D. 4, 121 N. W. 63.

The prior statement of a witness, in order to be provable for impeachment purposes, must be contradictory to or inconsistent with his testimony, and must relate to a material matter. 40 Cyc. 2701; *Wharton*, Crim. Ev. p. 993; *Underhill*, Crim. Ev. § 240.

The possession of recently stolen property not satisfactorily explained, is an evidential fact from which complicity in the larceny may be inferred. *State v. Rosencrans*, 9 N. D. 163, 82 N. W. 422; *State v. Drew*, 179 Mo. 315, 101 Am. St. Rep. 481, 78 S. W. 594.

The charge of the court upon reasonable doubt was proper, and not stronger than others approved by courts. *Vann v. State*, 83 Ga. 44, 9 S. E. 945; *Dunn v. People*, 109 Ill. 635, 4 Am. Crim. Rep. 52; *State v. Ostrander*, 18 Iowa, 459; *State v. Pierce*, 65 Iowa, 90, 21 N. W. 195; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265, 6 N. W. 669; 2 *Thomp. Trials*, §§ 2479-2488.

FISK, J. Defendant was convicted in the district court of Rolette county of the crime of petit larceny, and was fined in the sum of \$25 and the costs of the prosecution, and sentenced to the county jail of said county for the period of thirty days, or until such fine and costs are paid. From the judgment thus entered, he appeals, and the errors assigned relate solely to certain rulings excluding testimony offered by appellant at the trial, and to the instructions of the court

to the jury. Such assignments of error are grouped under certain general propositions which are set forth in the brief and will be considered in the order thus presented. Before noticing such assignments a brief statement of the facts is necessary to a proper understanding of the questions presented.

The information charges the larceny on November 3, 1911, of one complete set of slats and chain of a threshing-separator feeder, a complete chain and pulley sprocket and guide of a separator grain elevator, one leather belt about 3 inches wide, and one pulley shaft, the property of one Alex McKay, John Gardner, and John Wayne, known as McKay & Company. No proof was offered at the trial of the larceny of the pulley shaft, leather belt, or guide; and the evidence was confined entirely to the allegations as to the alleged larceny of the feeder slats and chains described in the information. For a further statement of the facts we here quote from appellant's brief as follows:

"The principal points in the evidence introduced by the state were that McKay & Company owned a threshing outfit in the fall of 1911, which was situated on November 3d, 1911, on the west side of Mount Pleasant township in Rolette county, North Dakota, and on the east side of the section line dividing that township from the Turtle Mountain Indian Reservation. November 3d, 1911, was on Friday. On the Tuesday prior to November 3d, the machine owned by McKay & Company was seen last by the owners, and at that time it was complete with all its fixtures and attachments. The feeder was up and ready for moving. The machine was not seen by them after that until the afternoon of November 3d. Then it was found that the feeder was down and that the slats had been uncoupled and removed, with the chains, the lower pulley, and the sprocket wheel.

The state introduced evidence showing the nature of the separator feeder. The feeder slats which had been removed were connected by chains at either end, which chains operated upon a sprocket wheel, somewhat similar to the canvas upon a binder. The purpose of the feeder slats was to elevate the grain into the separator. The length of the slats, chained together, when uncoupled and stretched out, was about 16 feet, and there were from 20 to 25 slats upon the chain. They were not new slats, but had been used considerably and were worn smooth. The corners of some of the slats had been worn off. These

were the slats, and this was the part of the separator which was missing on the afternoon of November 3d.

The state also introduced evidence that showed that one John Dunlop had seen the McKay threshing outfit on November 2d at about 4 o'clock in the afternoon, and that at that time the feeder, with the slats upon it, was intact; also, that on the morning of November 3d the said John Dunlop passed the defendant Schonberg on the road which passes the place where the machine stood. The defendant was coming from the machine and going towards his home. The defendant was driving a wagon, and Dunlop testified that he saw slats, connected with chains, in a bundle in the back of this wagon. Dunlop passed the defendant and went along the road toward the machine. When he passed it he noticed that the feeder was down and that the feeder slats were gone.

The state also introduced evidence by one Henry Meunier that he also saw the defendant on the 3d day of November, in the morning, on the road by the McKay machine, that the defendant had a buckboard buggy, and in the back end of the buggy a bundle of feeder slats, with chains on the slats. Said Meunier afterwards passed the McKay separator, and testified that the slats were then gone from the feeder, and the feeder was down.

The theory of the defense, on the trial of the case, was that the defendant got the slats which he had in the buggy on the morning of November 3d, from an old separator belonging to Harrington & Flynn, of Rolla; that he had made arrangements with them long before for the purchase of whatever slats he needed.

The defendant himself was interested in operating a threshing machine in the fall of 1911, and on the 3d day of November and for some days prior thereto had been threshing at the home of Alex Charlebois. Alex Charlebois's place, where the machine was working, was about 14 miles from where the McKay machine stood. On the afternoon of November 2d the defendant's machine broke down, some of the feeder slats being broken. The defendant's evidence showed that the feeder was repaired on the afternoon of the 2d after about one hour's delay, and thereafter continued to thresh without stopping, except to lay up for the night, until threshing was completed at Charlebois's. They had some extra slats, and made the repairs then and there. How-

ever, it was thought best by the defendant to get some additional supplies in case of another breakage, so in the afternoon of November 2d the defendant started out from Charlebois's place to drive to Rolla, and get some additional supplies for the separator. He drove from Charlebois's to his own home that night, and early the next morning got up and drove to Rolla. The McKay separator stood on the road which ran directly between the defendant's home and Rolla. On the morning of November 3d the defendant drove to Rolla, and went at once to Harrington & Flynn's machine shed, where the separator stood, took the slats and chains which he desired, and then drove back to Charlebois's reaching Charlebois's place at noon on the 3d of November.

The defendant offered as proof of his innocence that the slats which were in his buggy on November 3d, and which he took to Charlebois's place, were not the same slats that were on the McKay separator. He offered evidence to show that he had made arrangements to get these slats from Harrington & Flynn, and that the slats which were in his buggy were the slats which came from Harrington & Flynn's separator. He offered corroborative evidence of this in addition to his own direct testimony, and his contention in this court is that the trial court closed the doors of proof to him, so that he was unable to establish his innocence."

The first assignment of error challenges the correctness of the ruling of the trial court in sustaining an objection to the following question propounded to the state's witness, McKay, on cross-examination: "Is it not a fact you can run a feeder without having the slats, the feeder slats, so close?" Such question was clearly immaterial, and the answer thereto could in no manner have contradicted, rebutted, or weakened the testimony in chief of such witness. Such ruling was therefore clearly correct.

The next assignment is predicated upon the ruling sustaining an objection to a question asked the witness Dunlop as to what he testified to at the preliminary examination for the purpose of laying a foundation for impeachment of such witness. There is no merit in such assignment. The impeaching question was not germane to any testimony given by the witness on direct examination, and was therefore clearly improper. A prior statement of a witness, in order to be provable for the purpose of impeachment, must be, in some degree, contra-

dictory to or inconsistent with his testimony on direct examination. Tested by this elementary rule the objection was properly sustained.

The assignments based on specifications of error 3 and 4 are devoid of merit. Defendant sought to introduce certain exhibits in the form of a box of feeder rakes which had been removed from his threshing machine, for the purpose of proving that they had to be cut off at the ends in order to fit his machine, and that the defendant's feeder was not the same as that of the McKay machine. It is argued that these exhibits tended to prove an absence of any motive on defendant's part to commit the crime charged against him. It is also contended that this proffered testimony had a tendency to prove that these slats were the ones claimed to have been obtained by defendant from a machine owned by Harrington & Flynn. There was no connection, whatever, shown between these slats and those alleged to have been stolen. It is therefore entirely clear that such testimony was wholly incompetent, irrelevant, and immaterial, and no proper foundation was laid for its admission.

The next assignment is predicated upon the rulings sustaining objections to certain questions asked the witness, Emil Schonberg, defendant's brother, relative to the conversation between them. This witness had testified that he and the defendant operated a threshing rig for their father in the fall of 1911, and while threshing for one Charlebois they broke three feeder rakes on the afternoon of the second day, and that evening the defendant left the separator and went away. Whereupon the witness was asked to narrate a conversation with defendant just prior to his leaving, but was prevented from so doing on the state's objection. What the alleged conversation was does not appear, as no offer of proof was made. We are unable to say that the rulings were either erroneous or prejudicial, nor are we able to perceive on what possible theory the questions were proper. Manifestly, the answers to the questions would have merely amounted to self-serving declarations and hearsay statements of the defendant. Any expressed intent by the defendant to his brother of his purpose that night, if shown, would have no tendency to disprove the acts charged against him, and which are alleged to have been committed on the following morning. He may have stated to his brother at the time in question that he did not intend to commit the larceny of this property on the

next day, but this would clearly not be any competent evidence of his innocence. If such testimony is competent, there could be but few convictions. We entertain no doubt of the correctness of the rulings here complained of.

Appellant next complains of certain rulings sustaining objections to questions asked the witness Emil Schonberg on direct examination relative to the number and size of the feeder slats brought there by defendant, and whether they fit his father's machine. Also whether it was necessary to cut a piece off of such slats in order to fit them to his father's machine. No offer of proof of these various matters was made, and it does not appear that such rulings were in any manner prejudicial to defendant. It is asserted by appellant's counsel that by such rulings he was deprived of the opportunity of showing defendant's innocence, by showing that the slats which he brought there and which he is charged with stealing from the McKay separator were, in fact, obtained elsewhere and from another machine of a larger size, etc. If such was the fact, direct proof thereof was within his power. But in any event, as before stated, we are unable to see how such rulings were prejudicial. The fact, if it be a fact, that the slats which defendant brought to the machine on this morning of November 3d, were too large for his father's separator, and that they had to be cut off in order to be fitted thereto, in no way tends to disprove the charge laid in the information, nor does the fact that they were attached or not attached to chains have any particular materiality. What we have above said relative to the rulings on questions propounded to the witness Emil Schonberg are equally applicable to the rulings complained of regarding the testimony of the other witnesses along the same lines.

Error is also assigned upon the court's ruling in excluding testimony bearing upon the defendant's ability to read and write. We perceive no error in such ruling. Under the state of the record such proof was wholly immaterial.

The assignment of error predicated upon specification 21 is untenable. In view of the testimony of the witness Wayne to the effect that the slats from the McKay machine could be used on the defendant's machine, it was immaterial what make of feeder was used on the latter. No attempt was made to show that Wayne's testimony was not correct, to the effect that the slats on these feeders were interchangeable. No

prejudice was therefore shown on account of the ruling here complained of.

This brings us to a consideration of the assignments relative to the correctness of the instructions to the jury. Among other things the following instruction was given: "If recently stolen property is found in the possession of the defendant within a short time after the commission of the crime of larceny, *such finding is affirmative proof under the law that the defendant stole the property*, unless the defendant has explained to the jury how he came in possession of the property, so as to lead the jury to a reasonable doubt as to whether he is guilty or not guilty." We think such instruction is an incorrect statement of the law, and the court in giving it committed prejudicial error necessitating a reversal of the judgment. The language of the instruction that such recent possession "is affirmative proof under the law that the defendant stole the property," in effect told the jury that they should treat such circumstance as an established fact showing guilt, unless defendant has explained his possession consistent with his innocence. Such is not the correct rule as we understand it. See the definitions of "proof" and "affirmative proof" in Words and Phrases. Also 25 Cyc. 131-133, and cases cited; 18 Am. & Eng. Enc. Law, 483-485 and cases cited; Lee v. State, 27 Tex. App. 475, 11 S. W. 483; Tomerlin v. State, — Tex. Crim. Rep. —, 26 S. W. 214; Oxier v. United States, 1 Ind. Terr. 85, 38 S. W. 331; State v. Walters, 7 Wash. 246, 34 Pac. 939, 1098; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; State v. Rosencrans, 9 N. D. 163, 82 N. W. 422; Palmer v. State, 70 Neb. 136, 97 N. W. 235.

The instruction approved in the last case was as follows: "The jury are instructed that the possession of stolen property, recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a fact exclusively for the jury." We commend such instruction as both a correct and an excellent statement of the rule. See, also, in this connection, the very pertinent language of the Minnesota court in the recent case of State v. Hoshaw, 89 Minn. 307, 94 N. W. 873, which we most cordially approve.

Appellant's counsel criticizes the instructions in two other respects

which requires brief notice. He contends that the court erred in defining the term "reasonable doubt," and also in instructing the jury to disregard certain statements and arguments of counsel to the jury. The entire charge is not before us, but merely those fragmentary portions, the correctness of which are challenged. Nor is all the evidence before us. In view of this we cannot say that prejudicial error was committed, when it does not appear that the portions criticized are necessarily erroneous, regardless of any other instructions which might have been given, and regardless of the evidence which may have been introduced. *State v. Woods*, ante, 156, 139 N. W. 321. However, we deem the instruction relative to the duty of the jury to ignore certain portions of counsel's argument as erroneous under the rule announced in *Zilke v. Johnson*, 22 N. D. 75, 132 N. W. 640, and the authorities therein cited; but we perceive no serious objection to the other instruction complained of.

For the above reasons the judgment is reversed, and the cause remanded for further proceedings according to law.

SCHAFER v. OLSON.

(43 L.R.A.(N.S.) 762, 139 N. W. 983.)

Land contract — sale — agency — deed — delivery.

1. Plaintiff, a resident of Illinois, entered into a contract through correspondence, agreeing to sell to defendant Olson lands in this state, no place having been agreed upon for the closing of the deal. Defendant's agent, in a letter accepting plaintiff's offer, among other things said, "We inclose a warranty deed, which you can execute, and have your Elkhart bank send to the People's State Bank, of Lakota, and we will take same up." Plaintiff acted on such suggestion, and not only sent to the Lakota bank the deed, but also a sight draft for \$4,200 in a letter containing specific instructions to deliver

Note.—Authorities involving the precise question whether a bank to which paper is sent for collection at request of the obligor is the agent of the obligor or of the holder are not numerous, as shown by a review thereof in a note to *Virginia Carolina Chemical Co. v. Steen*, 34 L.R.A.(N.S.) 734, but such authority as there is seems to sustain the holding in *SCHAFER v. OLSON* that the bank is the agent of the owner of the paper.

same on payment of such draft, and to remit by New York or Chicago exchange.

Held, that the bank was plaintiff's agent for the collection of such draft and the consummation of the deal by the deed.

Banks — accounts — private checks — drafts — payments — insolvency.

2. One B, acting on defendant's behalf, gave to the bank a check drawn on B's account therein, in payment of such draft. Such check was accepted by the bank and the deed delivered, but no remittance to the plaintiff was made. B's account at the time showed a balance of about \$8,000. Eight days thereafter the bank ceased doing business.

Held, there being no proof that the bank was insolvent when the check was given and accepted, that the giving and receiving of such check constituted a payment of the draft.

Opinion filed March 15, 1912. On rehearing February 13, 1913.

Appeal from the District Court for Nelson County; *C. F. Templeton, J.*

From a judgment in favor of plaintiff, defendant appeals. Reversed.

H. A. Libby, for appellant (*Scott Rex*, of counsel).

The People's State Bank of Lakota was the agent of Schafer, and not the agent of Olson, in closing the land transaction. Rev. Codes, Sec. 5753; *Welge v. Batty*, 11 Ill. App. 461; *McMullen v. People's Sav. & L. Asso.* 57 Minn. 33, 58 N. W. 820; *Waldman v. North British & M. Ins. Co.* 91 Ala. 170, 24 Am. St. Rep. 883, 8 So. 666; *McCarty v. Fremont*, 23 Cal. 197; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Ingraham v. Whitmore*, 75 Ill. 24; *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367; *Ruthven Bros. v. American F. Ins. Co.* 92 Iowa, 316, 60 N. W. 663; *Appleton Bank v. McGilvray*, 4 Gray, 518, 64 Am. Dec. 92; *Underwood v. Birdsell*, 6 Mont. 142, 9 Pac. 922; *Furnas v. Frankman*, 6 Neb. 429; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319; *Daly v. Stetson*, 22 Jones & S. 202, 10 N. Y. S. R. 453; *Planters' Nat. Bank v. First Nat. Bank*, 75 N. C. 534; *McKinnon v. Vollmar*, 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800.

Even if Baird was Olson's agent, he could not delegate authority to banks to act as such agent. *Lewis v. Ingersoll*, 1 Keyes, 347; *Stephens*

v. Badcock, 3 Barn. & Ad. 354, 1 L. J. K. B. N. S. 75; 23 Am. & Eng. Enc. Law, 93—and cases cited.

Agent's acts not ratified, unless all material facts and circumstances are made known to principal. 1 Am. & Eng. Enc. Law, 2d ed. 1189; Rust v. Eaton, 24 Fed. 830; Wheeler v. Northwestern Sleigh Co. 39 Fed. 347; Wheeler v. McGuire, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190; Dean v. Bassett, 57 Cal. 640; Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; Hurley v. Watson, 68 Mich. 531, 36 N. W. 726; Colvin v. Peck, 62 Conn. 155, 25 Atl. 355; Stanley v. Chamberlain, 39 N. J. L. 565; Nichols v. Bruns, 5 Dak. 28, 37 N. W. 752; Combs v. Scott, 12 Allen, 493; Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516.

An agent to collect, as a general rule, and in the absence of special instructions, has no authority to receive anything in payment, but money. But, where an agent bank for collection receives and accepts its depositor's check on open account in bank, as payment, and makes delivery of deed, draft and papers for which collection and payment were so made, such transaction constitutes payment. British & A. Mortg. Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319; Welge v. Batty, 11 Ill. App. 461; Francis v. Evans, 69 Wis. 115, 33 N. W. 93; Bolles, Bkg. 557; Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265; Pinkney v. Kanawha Valley Bank, 68 W. Va. 254, 32 L.R.A.(N.S.) 987, 69 S. E. 1112, Ann. Cas. 1912 B, 115; Winchester Mill Co. v. Bank of Winchester, 120 Tenn. 225, 18 L.R.A.(N.S.) 441, 111 S. W. 248; Holtan v. Beck, 20 N. D. 5, 125 N. W. 1048; Rev. Codes, § 7317, subdiv. 20; Morse, Banks & Bkg. 4th ed. § 248; Bolles, Bkg. 557; Sayles v. Cox, 95 Tenn. 579, 32 L.R.A. 715, 49 Am. St. Rep. 940, 32 S. W. 626; State ex rel. North Carolina Corp. Commission v. Merchants' & F. Bank, 137 N. C. 697, 50 S. E. 308, 2 Ann. Cas. 537; Smith Roofing & Contracting Co. v. Mitchell, 117 Ga. 772, 97 Am. St. Rep. 217, 45 S. E. 47; Harrison v. Legore, 109 Iowa, 618, 80 N. W. 670; Hare v. Bailey, 73 Minn. 409, 76 N. W. 213; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Howard v. Walker, 92 Tenn. 452, 21 S. W. 897; 1 Morse, Banks & Bkg. §§ 248-305; 3 Randolph, Com. Paper, §§ 1395-1456; Commercial Bank v. Union Bank, 11 N. Y. 213, 214; Briggs v. Central Nat. Bank, 89 N. Y. 182, 42 Am. Rep. 285; Pollak Bros. v. Nall-Herlin Co. 35 L.R.A.(N.S.) 13, and cases

cited in note, pp. 36 to 38; Board of Education v. Robinson, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105.

Frick & Kelly, for respondent.

The People's State Bank was Olson's agent. McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. Rep. 79, 34 S. E. 111; Breck v. Meeker, 68 Neb. 99, 93 N. W. 993; Rev. Codes, § 5794; McMullen v. People's Sav. & L. Asso. 57 Minn. 33, 58 N. W. 820; Fair v. Bowen, 127 Mich. 411, 86 N. W. 991; Dodge v. Tulleys, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; Kidd v. Cromwell, 17 Ala. 648.

There was no payment in this case. The delivery to and acceptance by the collecting agent bank, of depositor's check on open account in such bank, not a payment of claim in hands of such bank for collection. Moore v. Pollock, 50 Neb. 900, 70 N. W. 541; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724.

Agent cannot bind his principal by any arrangement short of an actual collection of the money. Cooney v. United States Wringer Co. 101 Ill. App. 468; Wilken v. Voss, 120 Iowa, 500, 94 N. W. 1123; Everts v. Lawther, 165 Ill. 487, 46 N. E. 233; Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086.

Agent not authorized to accept in payment of principal's claim, an indebtedness against himself. Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 671; Deatherage v. Henderson, 43 Kan. 684, 23 Pac. 1082; Parker v. Leech, 76 Neb. 135, 107 N. W. 217; Western White Bronze Co. v. Portrey, 50 Neb. 801, 70 N. W. 383; Robinson v. Anderson, 106 Ind. 152, 6 N. E. 12; Smith v. James, 53 Ark. 135, 13 S. W. 701; St. John & M. Co. v. Cornwell, 52 Kan. 712, 35 Pac. 785; Talboys v. Boston, 46 Minn. 144, 48 N. W. 688; Lokken v. Miller, 9 N. D. 512, 84 N. W. 368.

Rule applies to bank receiving its own checks or certificates of deposit. Francis v. Evans, 69 Wis. 115, 33 N. W. 93; Bank of Montreal v. Ingerson, 105 Iowa, 349, 75 N. W. 351; State Bank v. Byrne, 97 Mich. 178, 21 L.R.A. 753, 37 Am. St. Rep. 332, 56 N. W. 355; Re Johnson, 103 Mich. 109, 61 N. W. 352; Wallace v. Stone, 107 Mich. 190, 65 N. W. 113.

24 N. D.—35.

FISK, J. This is one of those unfortunate controversies wherein one of two innocent persons must suffer for the default of a third person, and the crucial question for decision is, Whose agent, in the transaction between the parties, was such third person, plaintiff's or defendant's?

The facts necessary to a correct understanding of the points involved are as follows:

On, and prior to December 18, 1909, plaintiff, a resident of Springfield, Illinois, being the owner in fee of the real property described in the complaint, a quarter section of land in Nelson county, this state, entered into an agreement to sell such land to the defendant Olson, for the sum of \$4,500. Such contract was entered into through correspondence, the plaintiff having written to Olson a few days prior to December 18th, offering to sell the land to him at said price, the acceptance of which offer was communicated to plaintiff through a letter, Exhibit 1, written by one Thomas J. Baird to plaintiff, dated December 18th, as follows:

We are in receipt of your letter of the 13th inst. and herewith inclose you a check for \$200, as part payment on the N. W. $\frac{1}{4}$, 32-152-60. We also inclose you a warranty deed, which you can execute and have your Elkhart bank send to the People's State Bank of Lakota and we will take same up. If married you can fill in your wife's name.

We sold this land to Mr. Olson for \$4,500, you to pay us a commission of \$100, and Mr. Olson is to deliver your grain in the elevator free, which he will do as soon as possible. There will be \$4,200 balance due you on this proposition less abstracting. Send us abstracts of title at once. We inclose you a receipt, which please sign and return to us.

Very respectfully,
Thomas J. Baird.

On receipt of the Baird letter, plaintiff delivered such letter to his local bank at Elkhart, Illinois, and also a duly executed warranty deed of this land running to Olson, and instructed such bank to forward such deed to the people's State Bank of Lakota, as suggested in Baird's letter.

On January 6, 1910, the Elkhart bank, through plaintiff's son as

cashier, wrote the Thomas J. Baird Investment Company at Lakota as follows:

Gentlemen:—

I am this day forwarding by registered letter to the people's State Bank of your city warranty deed and abstract to the N. W. $\frac{1}{4}$, 32-152-60, along with sight draft for \$4,200 with exchange, advising them to deduct amount of abstracter's charge for recording the release of mortgage, which is the only item which does not appear on abstract, and otherwise there is nothing against the place whatever.

Inclosed herewith you will also find receipt for \$200 for first payment on this land. This deed has been in my possession for several days, with instructions from my father to send it on, but I have been very busy and it has been neglected, which I regret.

Very truly yours,

W. F. Schafer,

Cashier.

And on said January 6th such Elkhart bank also wrote the People's State Bank of Lakota as follows:

Gentlemen:—

I am handing you herewith at the request of the Thos. J. Baird Inv. Co., warranty deed to the N. W. $\frac{1}{4}$ 32-152-60, along with the abstract of title thereto and sight draft for \$4,200, with exchange.

There is a release of mortgage on record that is not shown on this abstract, the recording of which on this abstract may be deducted from the principal amount, but that is all, as there is nothing else against the place and hasn't been.

Upon the payment of the above amount, less the abstracting charge of that item, kindly turn the deed and abstract over to parties, and make remittance in New York or Chicago Exchange to me.

Very truly yours,

W. F. Schafer,

Cashier.

Thereafter defendant Olson, acting through Baird, procured a loan

from defendant Lord for the sum of \$4,000, giving a mortgage as security on this and another quarter of land, and the proceeds of such loan were deposited by the Baird Investment Company in the People's State Bank, and on January 18, 1910, such investment company gave its check payable to the order of the People's State Bank for the sum of \$4,199.20, representing the balance of the purchase price due plaintiff on such deal after deducting certain minor items of expense and the \$100 commission which plaintiff was to pay Baird, and thereupon the People's State Bank received such check and delivered the warranty deed aforesaid, and the same was thereafter duly recorded. At the time such check was given, the Thos. J. Baird Investment Company had on deposit in the People's State Bank the sum of about \$8,000. The testimony discloses that such check was not charged on the books of the bank against the account of the Baird Investment Company, and that the bank never remitted to plaintiff or to the Elkhart bank for plaintiff, by New York or Chicago Exchange or otherwise, the amount of the balance due plaintiff on such sale. Thereafter, and on the evening of January 26th, the bank closed its doors, and ever since has been in the hands of the state bank examiner, or a receiver appointed by the court in an action pending to wind up its affairs as an insolvent institution.

Plaintiff, by this action, seeks to recover such balance from Olson, and he is concededly entitled to recover unless the People's State Bank was his agent, and also unless the giving to and acceptance by such bank of the Baird check constituted in law a valid payment to him. Plaintiff had judgment in the lower court, and defendant Olson appeals.

There are but two points involved. First, Was the People's State Bank the agent of the plaintiff to receive the balance due him of such purchase price and to make delivery of the deed, or was such bank defendant Olson's agent? And, second, if it was plaintiff's agent, was the payment by check as aforesaid a sufficient payment to bind the plaintiff?

Conceding, for the sake of argument, all that respondent's counsel claim with respect to the authority of Baird to write the letter, Exhibit 1, as the agent of Olson, and consequently that the latter is bound by everything contained therein, still we find ourselves unable to agree with the conclusion of the trial court to the effect that the People's

State Bank was Olson's, and not Schafer's agent in consummating the deal. If the bank was Olson's agent to collect the purchase price and to deliver the deed, then Olson's agent Baird dealt with Olson's agent the bank, in closing the deal. In other words, it was a one-sided transaction of Olson dealing with Olson, Schafer not being represented at all. Surely it cannot be contended that this important business transaction was consummated, or was to be consummated, except by the payment of the purchase price and the delivery of the deed; and how either could be accomplished in the absence of plaintiff in person or through an authorized agent we are unable to understand.

The letter Exhibit 1 contains this language: "*We also inclose you a warranty deed which you can execute and have your Elkhart bank send to the People's State Bank of Lakota, and we will take same up.*" It is respondent's contention that this language amounts to a positive direction from Olson to Schafer to send the deed to such bank. We do not thus construe it. Olson, through his agent Baird, had no right to dictate where or how the deal should be closed, and of course Schafer knew this. Moreover, we think it manifestly clear that neither party thus construed such letter, but on the contrary it was intended merely as a suggestion of a convenient method of closing the deal. Schafer was at liberty to either act or refuse to act according to the suggestion, but having adopted and acted on the suggestion by sending the deed to such bank together with a sight draft for the balance of the purchase price, and giving full and explicit instructions to such bank regarding what should be done, we must hold that he thereby made the bank his agent for such purposes. Instead of the bank being thereby "created by Olson an instrumentality for closing the deal," it was created an instrumentality for such purpose by Schafer. Everything which the bank did or was authorized to do was for Schafer, to wit, the collection of the purchase price and the transmission thereof in the form of New York or Chicago Exchange to plaintiff, and also the delivery of the deed to Olson. We fail to see how such delivery of the deed could be made except by Schafer personally, or through his duly authorized agent.

In support of their contention that the bank was Olson's agent, respondent's counsel cite McMullen v. People's Sav. & L. Asso. 57 Minn. 33, 58 N. W. 820; Fair v. Bowen, 127 Mich. 411, 86 N. W. 991;

Dodge v. Tulleys, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; Kidd v. Cromwell, 17 Ala. 648. The Minnesota case appears, on cursory reading, to squarely support such contention, but on careful examination we do not thus construe it. The statements of Mr. Justice Mitchell tend, we think, to differentiate that case from the case at bar. We quote: "While it is true that the money was payable at defendant's office on presentation and surrender of the necessary vouchers, and that defendant was not bound to do anything until a demand was made at that place, yet it was competent for the defendant to waive this, and to propose a different method and place of payment; and while defendant, in doing what it did, might have been actuated by considerations of convenience to the plaintiff, yet we think the fair import of its letter to plaintiff was that, if she would send the papers to the bank, defendant would pay the money to her. It is probably fairly inferable that it contemplated making this payment through the medium of the bank (and this is as the plaintiff evidently understood it); but in doing so the bank would be the agent of the defendant. There is nothing in plaintiff's letter to the bank inconsistent with this idea, or indicating any intention on her part to appoint it her agent for the purpose of collecting or transmitting her money. All there is to it is that plaintiff, assuming that the defendant proposed to use the bank as its medium for the payment of the money, requested it to transmit it at its earliest convenience." The letter of plaintiff to the bank differs quite materially from that written by the plaintiff to the bank in the Minnesota case, as a comparison will disclose. In the case at bar, as we have before stated, a deed was transmitted to the bank, together with a sight draft for \$4,200, with specific instructions to deliver such deed only on payment of such draft, and when paid to remit in a certain manner, clearly proving that plaintiff intended to retain control of such deed, and not to deliver it until the sight draft was paid. The facts in the Michigan case clearly differentiate it from the case at bar, as do the facts in the two other cases cited by respondent's counsel.

Plaintiff intrusted to the People's State Bank the completion of the deal, and such bank was clearly Schafer's agent to receive the purchase price and to deliver the deed, and not Olson's agent to pay such draft.

Welge v. Batty, 11 Ill. App. 461; British & A. Mortg. Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319.

This brings us to the only other point in the case, which is, whether the delivery of the Baird check to the bank on January 18th constituted payment. We think it did. There is no proof that on said date the bank was insolvent, but even if there was, it is not contended that Baird had even the slightest intimation thereof, and at the time such check was tendered to and received by the bank it was, in so far as everyone had reason to believe, except the bank officials, a perfectly solvent institution, and for eight days thereafter it transacted its ordinary banking business. True, such check was not actually charged to Baird's account on the books of the bank until after the bank examiner took possession, such officer making such charge on the books. But we do not deem this controlling, for it is fair to assume from the record that if Baird had at that time requested the cash on the check it would have been counted out to him, and he could then have passed it back to the cashier in payment of the plaintiff's draft. This was a needless formality. Neither the law nor business usage exacted any such act on his part. It will be presumed, in the absence of proof to the contrary, that the bank, being at that time a going institution, receiving deposits and paying out moneys in the usual way, had funds on hand with which to pay the checks of its depositors in the usual manner. The fact that on January 26th the bank closed its doors and ceased doing business is no proof of its insolvency eight days prior thereto. We think that the act of the bank, in honoring Baird's check by receiving and retaining the same and by delivering the deed, operated in law as a payment of the draft. Such check, when thus accepted, was to all intents and purpose the equivalent of cash, and the mere matter of bookkeeping on the part of the bank officials, in entering or neglecting to enter such transaction on the books of the bank, is not the test as to whether payment was made. On the latter point we invite attention to the case of Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 670, where, among other things, the court, in disposing of a similar question, said: "It is true that the proper records were to be made upon the books, but the payment is effected by the acts, and not by the record, and was valid, even without records. Consequently the question of the subsequent records is not material. So far as re-

spected the plaintiff, the defendant had received the money for the note, and was bound to remit it to the plaintiff."

As lending support to our views that the transaction of giving the check by Baird, and its acceptance and retention by the bank, together with its delivery of the deed, constituted payment of the draft, we cite the following authorities, some of which are directly in point and others merely by inference: *Welge v. Batty*, and *British & A. Mortg. Co. v. Tibballs*, *supra*; *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. 265; *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93; *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 32 L.R.A.(N.S.) 987, 69 S. E. 1012, Ann. Cas. 1912 B, 115; *Winchester Mill Co. v. Bank of Winchester*, 120 Tenn. 225, 18 L.R.A.(N.S.) 441, 111 S. W. 248; *Harrison v. Legore*, 109 Iowa, 618, 80 N. W. 670; *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213; *Arnot v. Bingham*, 55 Hun, 553, 9 N. Y. Supp. 68; *Daniel v. St. Louis Nat. Bank*, 67 Ark. 223, 54 S. W. 214; *Briggs v. Central Nat. Bank*, 61 How. Pr. 250; *Nineteenth Ward Bank v. First Nat. Bank*, 184 Mass. 49, 67 N. E. 670; See also note to *Griffin v. Erskine*, 9 Ann. Cas. 1193; *Morse, Banks & Bkg.* § 305; 2 *Bolles, Bkg.* p. 557.

We have not overlooked the case of *State Bank v. Byrne*, 97 Mich. 178, 21 L.R.A. 753, 37 Am. St. Rep. 332, 56 N. W. 355, nor the other cases cited by respondent's counsel. In the *Byrne Case* the collecting bank received a demand draft for collection. The drawee of the draft was a depositor in the collecting bank, and when the draft was presented to him for payment he indorsed his acceptance thereon, and in accordance with a prior custom the bank charged such draft to the drawee's account. The bank failed to remit, and closed its doors within a few days thereafter, and it was held that such transaction did not constitute a payment of the draft. Such draft had not been delivered to the debtor, but was in the bank when it failed, and the same was thereafter returned to the creditor. It will thus be seen that the case is not directly in point with the case at bar. In the opinion the court takes occasion to criticize the cases of *Welge v. Batty*, and *British & A. Mortg. Co. v. Tibballs*, *supra*, and states that the great weight of authority is against these holdings. We feel obliged to differ with the Michigan court. The weight of authority, as well as reason, seems to be to the contrary, especially under facts like those in the case at bar.

The Michigan court, among other things, says: "The fact that a debtor has a credit at a bank is not conclusive evidence that the bank has money with which to honor his checks. As in this case, the bank may be insolvent when it receives the check, and there is no good reason apparent for permitting the depositor of an insolvent bank to pay his debt with worthless paper, thereby making his creditor a loser." With all this we most heartily concur; but, as before stated, the record is silent in the case at bar upon the question of the bank's insolvency; and this being true, it will certainly not be presumed that eight days before closing its doors the bank was insolvent or unable to pay its checks on presentment. We think the fact as stated in the Michigan opinion, that the collecting bank was insolvent when it received the check, or charged the draft as the equivalent of a check to the debtor's account, sufficiently differentiates that case from the case at bar.

The other cases which respondent cites are not in point.

The judgment appealed from is reversed, and the District Court is directed to dismiss the action.

On Rehearing.

FISK, J. A rehearing having been allowed herein, the questions involved have been fully and elaborately reargued by counsel. No new light, however, has been furnished us on such reargument, and after mature deliberation we are unable to discover any sound reason why we should change our former views upon either of the points involved; nor do we deem it necessary to add anything to what is said in the former opinion, further than to remark that we are not here confronted with a state of facts such as confronted the Michigan Court in *State Bank v. Byrne*, 97 Mich. 178, 21 L.R.A. 753, 37 Am. St. Rep. 332, 56 N. W. 355. There the evidence disclosed the insolvency of the bank at the time it received the check. The language in the opinion clearly shows such to be the fact. In the case at bar, however, no such proof was made, and in the absence thereof the presumption is that it was solvent and therefore had funds to pay all checks presented in the usual course of business; it appearing that it was a going concern, engaged in transacting its ordinary banking business by receiving and paying out deposits in the usual course. In the light of these facts, it would be a

most extraordinary and unusual rule which would require defendant's agent Baird, on presentation of his check, to require the bank to count out to him the cash on such check and then pass the same back to the bank in payment of the draft.

In addition to the authorities cited in the former opinion, see *Sayles v. Cox*, 95 Tenn. 579, 32 L.R.A. 715, 49 Am. St. Rep. 940, 32 S. W. 626; *State ex rel. North Carolina Corp. Commission v. Merchants' & F. Bank*, 137 N. C. 697, 50 S. E. 308, 2 Ann. Cas. 537; *Smith Roofing & Contracting Co. v. Mitchell*, 117 Ga. 772, 97 Am. St. Rep. 217, 45 S. E. 47; *Harrison v. Legore*, 109 Iowa, 618, 80 N. W. 670; *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897; 1 *Morse, Banks & Bkg.* §§ 248, 305; 3 *Randolph, Com. Paper*, §§ 1395, 1456; 2 *Bolles, Bkg.* p. 557.

In *Sayles v. Cox*, *supra*, the syllabus is as follows: "Collection by bank in a check upon itself is equivalent to collection in cash, even if the bank failed on the same day."

In *State ex rel. North Carolina Corp. Commission v. Merchants' & F. Bank*, *supra*, the facts were that, just prior to the suspension of the Merchants' & Farmers' Bank a milling company forwarded to it for collection a draft in the sum of \$693, attaching a bill of lading thereto covering a shipment of a carload of flour to the Purdie-Hooks Company, drawee of such draft. On February 8, 1904, the bank delivered the draft and bill of lading to the drawee, accepting therefor a check of such drawee against a deposit in the bank. On the following day, such bank voluntarily closed its doors because of insolvency, and the bank did not account for the proceeds of said collection; and among other things, the court said: "The transaction between the Purdie-Hooks Company and the bank amounted to a payment of the draft. . . . While the bank was open and doing business, . . . the transaction was a payment, and the same results would follow whether the bank was solvent or insolvent."

In *Smith Roofing & Contracting Co. v. Mitchell*, *supra*, the syllabus is as follows: "Where one gave to another, in payment of a debt, a check upon a bank at which he had on deposit sufficient money to meet the payment of the check, and the payee deposited the check for collection in another bank, which immediately forwarded it to the drawee

bank for payment, an entry on its books by the drawee bank, charging the amount of its depositor with the amount of the check, was equivalent to the payment thereof. The drawee bank then held the amount of the check as the agent of the payee, and the drawer was discharged from liability on the debt for which the check was given."

In the opinion of said case it was said: "The entry on the books of the Barnesville Savings Bank, charging the account of its depositor with the amount of the check, was the same as if it had paid the money over its counter to itself as agent for the bank which had sent the check for collection; and the fact that it fraudulently withheld the money from that bank and failed to enter the proper credit to its account does not render any less complete the payment by the depositor."

In *Harrison v. Legore*, *supra*, the syllabus reads: "Where an agent of a mortgagee accepts a certificate of deposit in payment of a mortgage, and deposits it in the bank which issues it, to the credit of his own account therein, the transaction is equivalent to a payment in cash."

In *Hare v. Bailey*, *supra*, one of the questions involved was whether a certain transaction between plaintiff and A. F. and L. E. Kelley, former loan agents at Minneapolis, constituted payment of a note and mortgage owing by the plaintiff to the defendant Bailey. Just prior to the maturity of such note and mortgage, plaintiff procured a loan through the Kelleys from one Dean, in which to make such payment. The Kelleys had Dean's money on deposit in their name in a bank, and they agreed to replace the Bailey loan out of the Dean money thus on deposit in their name, and accordingly took from plaintiff new loan papers payable to Dean. On the execution of the note and mortgage to Dean, the Kelleys charged him on their books with \$1,100, and credited this sum to defendant Bailey, but they never remitted such money to defendant. It was contended that the transaction by which the Kelleys merely made a transfer of a credit on their books from Dean to defendant, that they did not receive any money as defendant's agents, and plaintiff did not pay them any as such agents; that no money actually passed, and that this matter of mere bookkeeping cannot be held to be a payment of defendant's note and mortgage; and the court, among other things, said: "The case is the same as if the Kelleys had drawn \$1,100 out of the deposit to their credit in the bank,

and had said to plaintiff, 'This is the money which Dean has lent to you and with which he will pay Miss Bailey,' and had then redeposited it in the bank just as it had been deposited before it was drawn out; but this idle ceremony of drawing the money out of their account and redepositing it in the same account could add nothing to the binding character of the transaction. In our opinion the transaction amounted to a payment of the money to defendant."

In *Howard v. Walker*, *supra*, we quote from the opinion as follows:

"In his work on 'Commercial Paper,' Mr. Randolph says: 'If the holder of a bill directs that it be paid to a certain banker, procuring credit with such banker will amount to a payment of the bill. So, if the amount of a note is credited to a bank holding it for collection (according to the custom of dealings between the banks), it will be a payment, although the bank making the note and giving the credit failed on the day it was so credited,' vol. 3, §§ 1395, 1456. See also *Commercial Bank v. Union Bank*, 11 N. Y. 213, 214; *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285; *First Nat. Bank v. McClung*, 7 Lea, 492, 40 Am. Rep. 66.

"The doctrine has been extended, and collecting banks have been recognized as authorized to receive their own certificates of deposit in payment, and the debtor is discharged, even though the bank fails before remitting. 1 *Morse, Banks & Bkg.* § 305.

"These principles are not in contravention of that which permits an agent to receive only money in payment of his principal's debt. If the principal select a bank as his collecting agent, he is presumed to understand the business methods by which such transactions are affected through usages of banks. Actual ignorance of them is of no avail as an excuse; for, as said in the case cited by Mr. Morse on the last proposition herein stated, in respect to the transaction as a question of custom, ignorance of the plaintiff as to the existence of such usage was of no moment. Every business man must be held to know the method by which nearly all the banks in the country transact business by checks, drafts, and certificates of deposit. *British & A. Mortg. Co. v. Tibballs*, 63 Iowa, 468, 19 N. W. 319."

Morse on *Banks & Banking*, 4th ed. § 248, announces the rule as follows: "Collection by a bank of a debt sent to it for collection in a

check upon itself, is equivalent to collection in money, even if the bank failed the same day."

And in § 305 the rule is thus stated: "By custom, banks receive their own certificates of deposit as payment, and such custom will be judicially noticed by the courts, and will justify a collecting bank in receiving its own certificate of deposit in payment of paper it holds for collection; and the debtor is discharged, even though the bank fails before remitting. And especially will this be so where the owner of the paper directed the bank to remit by draft, for he is presumed to have intended a draft of the collecting bank.

"From the language of the court in this case it would seem that, custom or not, the payment ought to be good. 'The plaintiff in effect claimed that the debtor should have presented his certificates of deposit at the bank counter, and had the money counted out to him, and then counted it back to the cashier. The law does not require any such vain and unnecessary formality.'

"This is sound, of course, if the certificate would really have been paid by the bank, and the fact that the bank received it as payment is proof that it would have paid cash if demanded. In respect to the transaction as a question of custom, the court said that the ignorance of the plaintiff as to the existence of such usage was of no moment; every business man must be held to know the method by which nearly all banks in the country transact business by checks, drafts, and certificates of deposit.

"A sold land to B, and forwarded the deed to the C bank, to be delivered to B on payment to the C bank of \$2,000, which was to be remitted to A at once. The bank took its own certificates of deposit from B, and failed the same night before remitting to A. *Held*, it was a fraud on A to take the certificates, instead of cash, and that the funds in the hands of the assignee were impressed with a trust in favor of A to the extent of \$2,000, which should be paid in preference to other claims."

In 2 Bolles Modern Law of Banking, at page 557, we quote the following: "(Collecting) banks often do receive in payment checks drawn on themselves, and their own certificates of deposits, and in so doing have abundant judicial sanction, but they cannot receive a note or other claim against themselves, however valid it may be, in payment."

See also 8 Current Law, p. 1331, where it is said: "When honored by the drawee, a check or draft is equivalent to a cash payment relating to the time of delivery thereof, and this is true when delivery is to an agent, in the absence of an express limitation on the agent's authority to receive anything else than cash."

That our position may not be misunderstood, we repeat that, under the proof as disclosed in the record, the giving and acceptance of the check was the equivalent of a cash payment. The bank on which it was drawn accepted and retained it, and delivered the deed to defendant's agent Baird. The check as a medium for the payment of plaintiff's draft was thus treated the same as cash by plaintiff's collecting agent, the bank, in accordance with the universal business custom. This, under the authorities, constituted a cash payment of the draft, if, at the time, there were sufficient funds on hand belonging to the drawer of the check to meet such check. That there were such funds on hand in the bank will be presumed under the facts, in the absence of any showing to the contrary. The fact that the bank did not remit to plaintiff by Chicago or New York Exchange as per instructions from him, and that eight days thereafter it closed its doors, does not overcome such presumption. In the final analysis the whole question is whether any presumption arises as above stated that the check was the equivalent of cash. In order to show that it was, it is necessary that defendant go farther than to prove that the drawer of the check had on deposit in the bank a sufficient amount to cover the check, and that said bank received such check in the ordinary course of banking business as payment for the draft which is held for collection? We think not. We do not concede as a fact that the check and draft were not paid, but we assert that the exact contrary is true under the status of the proof as presented by the record. See also Pollak Bros. v. Niall-Herlin Co. 35 L.R.A.(N.S.) 13, and cases cited in note at pages 36 to 38, and Board of Education v. Robinson, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105.

Our conclusion, as announced in the former opinion, is adhered to.

BRUCE, J. (dissenting). On a maturer consideration, I am satisfied that this court erred in its former opinion, and that the judgment in this case should be affirmed. I am quite satisfied that the People's

State Bank, of Lakota, was the agent of the respondent, Schafer, for the delivery of the deed and the receiving and transmission of the money. I am led to this belief principally by the fact that before the transaction could be culminated there must have been a delivery of the deed. Before the delivery was authorized in any way, however, payment was required to be made, and there was no one authorized to make the delivery except the People's Bank. It cannot possibly, indeed, be contended that the sending by Schafer of the deed to the bank amounted in itself to a delivery to the defendant Olson. I am equally well satisfied, however, that the People's Bank had no authority, either express or implied, to collect the payment in anything else but money; and that its principal, Schafer, was not bound even as against the defendant Olson, by the acceptance of the check in this case. It is elementary that an agent who is authorized merely to collect a demand or to receive payment of a debt cannot bind his principal by any arrangement short of an actual collection and receipt of the money; nor has he any authority to accept in payment of his principal's claim an indebtedness against himself. 22 Am. & Eng. Enc. Law, 552; 5 Cyc. 505; National Bank v. Johnson, 6 N. D. 180, 186, 69 N. W. 49; State Bank v. Byrne, 97 Mich. 178, 21 L.R.A. 753, 37 Am. St. Rep. 332, 56 N. W. 355; Ward v. Smith, 7 Wall. 451, 19 L. ed. 209; Pitkin v. Harris, 69 Mich. 133, 37 N. W. 61; Hurley v. Watson, 68 Mich. 531, 36 N. W. 726; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 67; McCarver v. Nealey, 1 G. Greene, 360. I can see no difference between a case where the collecting agent is a bank and a case where the collecting agent is an individual. In such a transaction the bank is not, strictly speaking, acting as a bank, but as a real estate or collecting agent. The payer or vendee must be presumed to have had this elementary knowledge of the law, as well as the collecting agent or bank itself; and if he chose to make his payment not in cash, but by a substitution of credits which I believe the presentation and acceptance of the check merely amounted to, he did so at his own risk. The case of State Bank v. Byrne, 97 Mich. 178, 21 L.R.A. 753, 37 Am. St. Rep. 332, 56 N. W. 355, is entirely in point, and to me expresses the correct view of the law. In that case the plaintiff sent, for collection, a demand draft on defendant, to a bank

with which it had an account. When drafts on defendant were sent to such bank for collection, he was accustomed to write his acceptance thereon and pass them back to the bank, where they were treated by defendant and the bank as checks. Defendant, according to such custom, wrote his acceptance on the draft in suit, passed it back to the bank, and charged himself with it in his pass book, but the bank failed and never paid plaintiff. It was held that the transaction between the defendant and the bank did not constitute a payment, in so far as the plaintiff was concerned. The court, in passing upon the question, said: "The most that can be claimed for this transaction is that the defendant, by accepting and delivering the demand draft, directed the Milford Bank to pay the same and charge the amount to his account, and that the bank promised to do so. As between them, it was perhaps understood that defendant had paid this draft, but it was in law no more than an attempted substitution of the bank for himself as debtor. Had the acceptance been a check, and the check drawn upon another bank or private person, the effect would have been in law the same. The law requires payment in money; and, as already shown, nothing else answers the purpose, except by agreement with the creditor, or his agent, duly authorized, to accept something else. As between defendant and his bank, it was clearly the latter's duty to honor his check (or acceptance, which under their custom was practically a check) by payment of the draft; but the creditor was no party to that transaction. The bank was plaintiff's agent to collect the money, not to make an arrangement by which it should assume the debt. A debtor who seeks to pay a debt through his debtor, thereby securing his own claim, acts at his peril, and is not exonerated from his obligation until his debtor performs his part by satisfying the creditor. There are a few authorities which, at first blush, might be supposed to justify a different conclusion. Morse on Banks & Banking, § 247 is authority for the following: 'By custom, banks receive their own certificates of deposit as payment, and such custom will be judicially noticed by the courts, and will justify a collecting bank in receiving its own certificate of deposit in payment of paper that it holds for collection; and the debtor is discharged, even though the bank fails before remitting. And especially will this be so where the owner of the paper directed the bank to remit by draft, for he is presumed to have intended a draft on the collecting

bank.' The case of *British & A. Mortg. Co. v. Tibballs*, 63 Iowa, 468, 19 N. W. 319, is the authority cited for this. It bases the decision upon the usage of banks, which it says courts will take judicial notice of. This was a certificate of deposit. If there is any usage by which certificates of deposit are so used, it is plain that such certificates are but the promise of the bank to pay; and, were it the certificate of deposit or certified check of another bank, it would be the mere substitution of one obligation for another, and it is difficult to see any difference between such a case and one where the certificate of deposit or certified check is that of the collecting bank. This holding is not supported by citations. Mr. Justice Reed dissents in an able opinion, adhering to the common-law rule. Another case, that of *Welge v. Batty*, 11 Ill. App. 461, is relied upon. Here the debtor drew a check on the collecting bank, having at the time a deposit sufficiently large to cover it. The check was received and draft delivered, and the amount was charged against the debtor on his bank account. A draft was sent by the collecting bank, but, before it got around, the bank failed. This was held to be a payment, the court saying that it would have been an idle ceremony for the debtor to draw his money out of the bank and pay it back again to the bank. Here, again, the court cites no authority to support its decision. The great weight of authority is against these cases. The payment by check, certificate, or what not is not for the convenience of the creditor, and he has no concern with the fact that it is the custom of the bank to take checks in payment. The fact that a debtor has a credit at a bank is not conclusive evidence that the bank has money with which to honor his checks. As in this case, the bank may be insolvent when it receives the checks, and there is no good reason apparent for permitting the depositor of an insolvent bank to pay his debt with worthless paper, thereby making his creditor a loser. No custom should be allowed to justify such a transaction, unless it be in a case where the creditor is connected with and a party to the custom. Many cases can be found where checks are received and operate as payment, but they are usually in suits between the creditor and the collecting bank, where a different question is involved. Upon the undisputed facts of this case the plaintiff was entitled to the verdict which the court properly directed."

The opinion in the above case expresses what to me appears to be

the sounder public policy and the real state of the law. Nor do I believe that the mere fact that the letter of instructions to the People's Bank contained the words, "make remittance in New York or Chicago Exchange to me," makes any difference in the rule. It may possibly be, as suggested by Mr. Morse in § 247 of his work on Banking, that the creditor may be presumed to have intended a draft of the collecting bank. A draft of the collecting bank, however, necessarily presupposes an account of that bank with a correspondent, or money with which to make such draft good. Even though the People's Bank had been totally insolvent at the time of the transaction in question, it, if it had been paid the money in cash, could have purchased such a draft either through another bank which had such a deposit, or have such deposited the money collected in the correspondent bank so as to make its own draft good. I am, in short, of the opinion that in this case the People's Bank was not acting strictly as a bank, but as a collecting agent.

Another reason why I am of the opinion that the judgment of the district court should be affirmed is that the plea of the defendant in this case is a plea of payment, and the burden of proof is upon the defendant to substantiate that plea. *Lokken v. Miller*, 9 N. D. 512, 84 N. W. 368. The plea can only be good in any consideration of the authorities, provided that he had a deposit in the bank sufficient to cover the check, and that there were in the bank funds sufficient to cover that deposit so that the acceptance of the check might operate as an equitable assignment. 5 Cyc. 505, note 74. The cases, indeed, which hold that the acceptance of a check is sufficient generally do so on the theory that it would be but an idle ceremony to require payment of the money represented by the check over the counter, and a repayment of the identical money to the bank. This, however, presupposes the existence of his money in the bank, and it would seem to me that the burden is upon the defendant to prove such fact. He has seen fit to violate the common rule of cash payment. If there is an exception to the rule he must put himself clearly within it. This he has failed to do.

The state of the law, as I understand it, is merely this,—a collecting agent has no implied authority to receive anything in payment but cash. Some courts make an exception in the case of banks, but this does not seem to be the case where there is no proof of the solvency

of the bank, or that the money could actually have been forthcoming with which to meet the check if a payment over the counter had been demanded. In other words, the defendant in such cases must show that the payment of the money over the counter would have been a mere idle ceremony, and this he cannot do without showing the existence of the money in the bank at the time of the presentation of the check. In the leading case of *British & A. Mortg. Co. v. Tibballs*, 63 Iowa, 468, 470, 19 N. W. 319, 320, which is cited by Mr. Justice Fisk in his opinion on the first hearing and is generally cited as authority for the proposition that a bank may receive its own checks in lieu of cash, the evidence is clear and positive that at the time of the transaction not only was the bank paying in cash all certificates of deposit presented to it, but "the bank had on that day over \$8,000 cash on hand with which to transact its current business," and that at the time and after the transaction Massey saw displayed upon its cash table from four to eight hundred dollars. The evidence also showed that a few moments prior to the transaction, a deposit of four hundred dollars in cash had been made. Massey's certificate only called for \$540. It was therefore perfectly clear that the payment of the amount over the counter and a repayment of it would only have been an idle ceremony. This fact the debtor in that case proved, and nothing was left to surmise or to conjecture. Even in that case, however, there was a strong dissenting opinion.

The only evidence in the case at bar upon the subject of the solvency of the bank, or that it had any funds with which to meet the check if a payment over the counter had been demanded, is to the effect that Baird & Company had a credit or deposit in said bank of over \$8,000, and "that the bank ceased to do business and was closed by the examiner some eight days after" the transaction. There is no evidence whatever as to what amount in cash it had in its vaults at the time of the transaction, or as to whether it had any at all. Nor is there any evidence as to whether, during those eight days, it paid out any money at all. The sight draft called for \$4,197.20. The bank might well, by receiving dribblets as deposits and paying out dribblets, have kept its doors open during such eight days, without at any time having on hand enough money with which to meet the check in question. We realize fully that insolvency at a certain date does not, in itself, raise

the presumption of insolvency at a prior date. We do not, however, believe that the mere fact that the doors of a bank are open, and that it is transacting business, raises any presumption that it has on hand the sum of \$4,000 with which to meet a check, or, at any rate, that the presumption is that a demand for the payment of the money over the counter would be a mere idle ceremony. The general rule, in short, is that payment must be made in cash. The defendant seeks to come within an alleged exception to the rule, and he has failed in his proof.

I am not aware of ¶ 9, of § 7317, of the Revised Codes of North Dakota, which provides that "all other presumptions are satisfactory if uncontradicted. They are denominational, disputable presumptions, and may be contradicted by other evidence. The following are of that kind: (9) That an obligation delivered up to the debtor has been paid." There is in the case, however, no proof that the draft was ever delivered to Baird, though there is proof that the deed was delivered. Even if the delivery of the deed alone was sufficient to bring the case within the section of the statute mentioned, still the ultimate burden of proof has not been shifted. The burden was upon the defendant in the first place to prove payment. He raises a disputable presumption of payment by obtaining possession of the deed. This presumption, however, is met by proof that the payment was made, not in cash, but by a check,—a payment which was conditional merely, and would only be operative, provided that there was money in the bank to meet the check, so that the payment of the same over the counter would merely have been an idle ceremony, or that the agreement of the parties was that a check might be received. In other words, plaintiff has rebutted the presumption of payment by showing a conditional payment, and the burden is now shifted upon the defendant to prove that these conditions have been complied with.

I am now of the opinion that the judgment of the District Court should be affirmed.

SPALDING, Ch. J. (dissenting). Although not certain that the bank was not the agent of the defendant, on the assumption that it was plaintiff's agent, I am impelled to concur in the dissent of Mr. Justice Bruce. The question of payment seems quite simple, and rests upon a few elementary principles. No refinement of reasoning is necessary

to reach a conclusion. It is conceded that an agent may accept nothing except cash in payment of a debt to his principal, unless authorized to receive a substitute. It is also conceded that a check is not payment, in the absence of an agreement that it shall be received as payment. The plaintiff never ratified the acts of the bank. The bank never charged Baird's check to his account, and never transmitted either money or a draft to the plaintiff. It is also conceded that the burden of proving payment is upon the defendant. In view of all these conceded propositions I am unable to understand how the facts can shift the burden to the plaintiff and require him to prove that the bank was possessed of funds with which to pay it. The fact that no remittance was made to plaintiff during the eight days the bank remained open must, at least, tend to show a lack of funds with which to make a remittance. Cases in which it was shown that the money was actually in the bank do not sustain the majority opinion, and such are most of those cited, and the checks were charged to the drawer by the banks. To make the check good, two things are vitally necessary: First, that the drawer have credit at the bank; and, second, that the bank have funds with which to honor the check. Both of these elements must be proved, wherever necessary, or payment is not shown. Payment means something besides the delivery of a piece of blank or worthless paper. It means payment in truth, and no substitution of obligations is payment unless accepted as such by the creditor. For authorities in addition to those cited by Judge Bruce bearing upon this subject, see: 2 Bolles, Bkg. 557 (f), 625; Randolph, Com. Paper, §§ 1550, 1551, 1553, 1554; Graham v. Sykes, 15 La. Ann. 49; Devlin v. Chamblin, 6 Minn. 468, Gil. 325; Olcott v. Rathbone, 5 Wend. 491; Born v. First Nat. Bank, 123 Ind. 78; 7 L.R.A. 442; 18 Am. St. Rep. 312, 24 N. E. 173; McMullen v. People's Sav. & L. Asso. 57 Minn. 33, 58 N. W. 820.

In several of the authorities cited in the majority opinion, the holding that the giving of a check and its acceptance by the collecting bank constituted payment is based upon the proposition that it would be an idle ceremony to hand to the owner of the check the money and immediately receive it back, but in such cases the reasoning rests upon the proved or admitted fact that the bank had the money. This proof is lacking in the case at bar. In Devlin v. Chamblin, 6 Minn. 468, Gil.

325, the supreme court of Minnesota says: "The taking of the note or security of a person other than the debtor is not prima facie evidence that the same was taken in payment of a precedent debt. There must be evidence of an express agreement to take such note in payment, in order to give it that effect; and the burden of proof is upon the debtor to show such agreement." And again: "But the whole question would appear to be one of fact for the determination of a jury, rather than of law for the court; and, as the ordinary understanding in contracts of sale is that the vendor shall, in some way or other, get his money, the burden of proof ought to lie on those who seek to show that he agreed to be satisfied with something less."

In *Olcott v. Rathbone*, 5 Wend. 491, it is said: "Nothing is considered as an actual payment which is not in truth such, unless there be an express agreement that something short of the payment shall be taken in lieu of it. . . . The defendant who has got possession of it (the check) without fraud . . . but without payment, cannot defend himself against a suit on it by showing that fact, unless he shows also an actual payment or an agreement that the small note and check should be taken in full and absolute satisfaction." *McMullen v. People's Sav. & L. Asso.* 57 Minn. 33, 58 N. W. 820, is on all fours with this case, and the court there held that the collecting bank was the agent of defendant.

In *Sutherland v. First Nat. Bank*, 31 Mich. 230, it is held that where the maker, instead of attending to the payment of a note himself, intrusts the money to his bankers to do it for him, he thereby makes them his agent; and if they fail to carry out his instructions he cannot saddle the loss upon the holder of the note, who has simply sent the note forward indorsed for collection, and for whom such bankers have performed no act of agency in the premises. And the Michigan court there expressly declines to pass upon the question as to how far the owner would have been bound had the bankers, having the note for collection and the money of the maker to pay it with, canceled the note or changed the credit on their books from the maker to the owner.

In *Aultmann v. Lee*, 43 Iowa, 404, it was held that a receipt of wheat by an agent for the collection of a note, with an agreement to indorse the amount upon the note, which agreement he failed to carry out, did not constitute payment, in the absence of authority by the

agent to accept wheat, as the payment should have been made in money to discharge the debtor from liability.

The defendant pleaded payment. He started to prove payment, and as a step in that direction proved that he delivered the check of Baird to the bank, and that on Baird's deposit account there was a credit due him of \$8,000 from the bank. Here his proof of payment rested, and it is now in effect said that the burden, by this incomplete proof of payment, shifted to the plaintiff, and that it devolved upon him to supply the lacking evidence. There is no pretense that the plaintiff either agreed to receive the check in payment, or that he authorized the bank to do so, or that, in fact, it was ever credited to his account or charged to Baird's account. In fact he knew nothing whatever of the check, and no claim is made that any proceeds of the check were ever sent him. The majority admit that had the plaintiff proven there was no money in the bank with which to honor the check the judgment should be affirmed, but I am unable to see how this series of unauthorized and illegal acts on the part of the defendant and the bank shifts the burden to the plaintiff, which, except for such illegal and unauthorized acts, would remain with the defendant. The burden of proof was at all times on the defendant under his plea of payment, and payment was not made unless there was money in the bank with which to honor the check of Baird. How, then, does the proof of part of the acts necessary to constitute payment, without proof of the other fact necessary, shift the burden? In 2 Wharton on Contracts, § 854, under a discussion of the law of novation, this subject is covered, and it is said that it must be shown from all the facts that it was the intention of the creditor that there might be substituted one debt for the other. And it seems to me that the majority opinion is in direct conflict with provisions of §§ 5273 to 5276, both inclusive, of Rev. Codes 1905. Might it not as well be held that the burden is on the plaintiff in the first instance to negative payment? In fact, I think the bank was the depository of an escrow, and as such the agent of both parties, unless the request of Olson's agent, Baird, for Olson's convenience, that the deed be deposited in the bank, constituted the bank sole agent of Olson, as is held in the McMullen Case, *supra*. While there could be no question of the correctness of the judgment if the bank was Olson's agent only, yet in view of the conclusion I reach this

is immaterial. To restate the proposition in a sentence, how can the fact that the bank delivered a deed which it had no right to deliver, and received a check which it had no right to receive, overcome the burden cast upon the defendant by his plea of payment, and cast it upon the plaintiff, and compel him to prove that there were funds in the bank with which to make this check, received without authority, good?

STATE EX REL. BALE et al., as Board of Drainage Commissioners in and for Ransom County, v. MORRISON et al., as Supervisors of the Township of 134-58, Known and Designated as Hanson Township, Ransom County, North Dakota.

(140 N. W. 707.)

Drainage law — petition — municipality — citizens — public demand for drain — assessment — drainage board — authority.

1. The drainage law, as amended by chap. 93, Laws of 1907, provides that "if among the leading purposes of the proposed drain are benefits to the health, convenience, or welfare of the people of any city or other municipality, the petition shall be signed by a sufficient number of the citizens of such municipality or municipalities to satisfy the board of drain commissioners that there is a public demand for such drain."

Held, that when a drain is proposed to be established for the above-mentioned purposes, the board has no authority under the provision quoted to make an assessment for the establishment and construction of a drain lying in one township against another township, in the absence of signatures to the petition of citizens of the township so attempted to be assessed.

Opinion filed February 14, 1913.

Appeal from a judgment of the District Court for Ransom County, Allen, J.

Reversed.

Chas. S. Ego, for appellants.

The drainage board has no authority upon petition for a drain by citizens of one municipality, to make assessments for drain in such municipality, against another municipality, in the absence of signatures

to the petition of citizens of the municipality sought to be assessed. Rev. Codes 1905, § 1821.

The term, "public demand for drain," has a restricted meaning, and relates only to the *citizens* of the municipality represented on the petition. Rev. Codes 1905, Sec. 1821; *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1010; *Jones v. Chanute*, 63 Kan. 243, 65 Pac. 243; *South Highland Land & Improv. Co. v. Kansas City*, 172 Mo. 523, 72 S. W. 944; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 30 S. C. 579, 3 L.R.A. 777, 9 S. E. 661.

Rourke & Kvello, for respondents.

The office of a petition for a drain is simply to call the attention of the drain commissioners to the necessity of a drain in that particular locality, and need not be signed by citizens of *each* municipality assessed for its construction. Rev. Codes 1905, Sec. 1821; *Sim v. Rosholt*, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50; *Mackay v. Hancock County*, 137 Iowa, 88, 114 N. W. 553; *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233; *Chandler v. Heisler*, 153 Mich. 1, 116 N. W. 626; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841.

SPALDING, Ch. J. June 24, 1909, a petition was filed with the board of drain commissioners of Ransom county for the construction of a drain a little over a mile in length, on sec. 2, in township 134 north, of range 57 west, known as Elliott civil township, in Ransom county. The petition need not be set out at length. It is sufficient to say that it was signed by thirteen citizens, residents and freeholders of Springer and Elliott civil townships, Springer being the township north of Elliott; and represented that "among the leading purposes of the proposed drain are benefits to the health, convenience, and welfare of the people of Springer and Elliott townships, and that the public necessity, convenience, health, and welfare of said people require the construction and maintenance of a drain as hereinafter described, and that one of the chief purposes of said drain is the drainage of agricultural, meadow, grazing, and other lands of said county." Hanson township is the township west of Elliott, and at its eastern boundary is more than 4 miles distant from any part of the proposed drain. In the petition Hanson township was not mentioned, directly or indirectly, and no freeholder, citizen, or resident of that township signed the petition. The commis-

sioners personally examined the route of the proposed drain, caused a survey to be made, the cost determined, and a plat of the lands to be drained forthwith made, and, after the same was made and filed, caused notice of the hearing of objections to the drain to be posted along the route of the same, as provided by law. After such hearing the board entered its order establishing the drain. The assessment and letting of contracts were then noticed, and the township of Hanson, being township 134 north of range 58 west, was assessed \$523.60. The notices of the hearing on the assessment were posted in each township, including Hanson township, and it is conceded that all the other steps necessary were taken in compliance with the law as it then existed. The general procedure is not attacked. Section 1821, Rev. Codes 1905, as amended by chap. 93, Laws of 1907, was the law then in force providing for the establishment of drains, and reads as follows:

“A petition for the construction of a drain may be made in writing to the board of drain commissioners, which petition shall designate the starting point and terminus and general course of the proposed drain. If among the leading purposes of the proposed drain are benefits to the health, convenience, or welfare of the people of any city or other municipality, the petition shall be signed by a sufficient number of the citizens of such municipality or municipalities to satisfy the board of drain commissioners that there is a public demand for such drain. If the chief purpose of such drain is the drainage of agricultural, meadow, grazing, or other lands, the petition shall be signed by at least six or more freeholders whose property shall be affected by the proposed drain. Upon the presentation of a petition as hereinbefore provided, and filing of the same, the board of drain commissioners shall personally as soon as practicable proceed to examine the line of the proposed drain, and if in its opinion it is necessary for the public good, it shall enter a resolution to that effect, and shall also enter a resolution designating a competent surveyor who shall survey the line thereof and establish the commencement and terminus, and determine the route, width, length, and depth thereof. For the purpose of making examinations or surveys the board of drain commissioners, surveyors, and their employees may enter upon land traversed by any such proposed drain, or upon other lands when necessary. Such surveyor shall prepare profiles, plans, and specifications of the proposed drain, an estimate of the cost thereof, and a

map or plat of the lands to be drained, in duplicate, showing the regular subdivisions thereof, one copy of which shall be filed in the office of the county auditor in the county in which the drain is proposed to be constructed, and the other with the board of drain commissioners, subject to inspection. In locating a drain, the board of drain commissioners may, under the advice of the surveyor, vary from the line described in the petition as it seems best. When the line proposed is along highways already established, the drain shall be located at a sufficient distance from the center of such highway to permit a good road along the central line thereof; when the length of the line described in the petition does not give sufficient fall to drain the lands sought to be drained, the board of drain commissioners may extend the drain below the outlet named in the petition far enough to obtain a sufficient fall and outlet. Drains shall, as far as practicable, be located on dividing lines between sections or regular subdivisions thereof, but the general utility of the drain must not be sacrificed to avoid crossing any tract of land in such direction as the board of drain commissioners find advisable. Upon the filing of the surveyor's report the board of drain commissioners shall fix a date for hearing objections to the petition, and shall give notice of such hearing by causing five notices to be posted along the line of the proposed drain at such points as will be likely, in the opinion of the board, to secure the greatest publicity. Such notices shall contain a copy of the petition, and a statement of the date of filing of the surveyor's report, and the date when the board will act upon the petition, and shall be signed by the members of the board or a majority thereof. All persons whose land may be affected by any such drain may appear before the board of drain commissioners and fully express their opinion and offer evidence upon the matters pertaining thereto."

And § 1826, Rev. Codes 1905, reads as follows: "Upon acquiring the right of way, if the assessment of benefits has not already been made under the provisions of § 1824, the board of drain commissioners shall assess the per cent. of the cost of constructing and maintaining such drain, and of providing the right of way therefor, which any county, township, city, village, or town shall be liable to pay by reason of the benefits of such drain to the public health, convenience, or welfare, and which any railroad company shall be liable to pay by reason of benefits to accrue to its property, and which any lot, piece, or parcel of land shall

be liable to pay by reason of benefits to accrue thereto, either directly or indirectly, by reason of the construction of such drain, whether such lands are immediately drained thereby, or can be drained only by the construction of other and connecting drains, but such assessment shall be subject to review by the commissioners as hereinafter provided." This section is the one under which the notice of assessment of Hanson township hereinafter referred to was given.

On the 22d of October, 1910, a correct copy of the assessment of Hanson township was served upon the clerk of that township, and at the same time a demand was served upon him that the board of supervisors, at their first general tax levy thereafter, include the amount so assessed against it by the board of drainage commissioners in their general tax levy, and make due return thereafter to the county auditor of Ransom county. Afterwards the order establishing such assessment, with proofs of service, was filed in the office of the auditor of Ransom county. On the 18th day of March, 1911, a second demand was served upon the clerk of Hanson township for the levy and return of such tax. The board of supervisors of Hanson township held their regular meeting on the 28th day of March, 1911, and refused to make such levy and return, and so notified the drainage commissioners. Whereupon the drain commission commenced this proceeding in the district court of Ransom county for the purpose of securing a writ of mandamus commanding the said township board to make and return such tax levy against the township of Hanson. The petition and writ set out the facts hereinbefore stated, with all the other steps taken by the drainage board in detail. The township board filed a motion to quash the writ on the ground that neither the petition nor writ stated facts showing the board of drain commissioners entitled thereto. The order establishing the drain contained the findings of the board, which were the basis for its establishment, and as far as material are as follows:

"A petition for the location and establishment of a drain having been, on the 24th day of June, A. D. 1909, filed with the board of drain commissioners in and for Ransom county, state of North Dakota, and said commissioners, on the 25th day of June, A. D. 1909, having viewed and examined the route of such proposed drain and the land intended to be drained thereby, and it appearing to the board that such drain is necessary and for the public good, and that it will be a benefit to the

public health, convenience, and welfare, and that the petition was filed with the board, is sufficient under the law, and that there was sufficient cause for the making of such petition," etc.

The only question discussed in this Court is the necessity for the petition to have, among its signers, some citizens of the township of Hanson in order to give the board jurisdiction to apportion any part of the assessment for the construction of such drain to that township as a township. It has been repeatedly held by this court that the filing of a proper petition gives the drainage board jurisdiction to establish a drain. *Hackney v. Elliott*, 23 N. D. 373, 137 N. W. 433; and cases cited; *Edwards v. Cass County*, 23 N. D. 555, 137 N. W. 581, and cases cited. But we are unable to find any case decided by this court relating to the location of the signers necessary to give jurisdiction or power to the board to make an assessment against this township as such. We apprehend that the only basis for assessing this township as such is that the drain for which assessment is made will be for the benefit of the public health, convenience, or welfare of the people of the township. Section 1826, Rev. Codes 1905, *supra*. And the statute requires in case of a drain from which the principal benefits are to the health, welfare or convenience that the petition be signed by a sufficient number of the citizens of the municipality or municipalities to satisfy the board of drain commissioners. Section 1826, *supra*, is the only authority for assessing a township, and authorizes it only when such benefits are to accrue. In this case the petition contained nothing whatever, either by means of a description of the purpose, beginning and terminus and location of the drain, or the citizenship of the signers, or in any other manner, to inform the officials of Hanson township that a drain was contemplated which should in any manner affect that township or its people. Section 1821, *supra*, provides for the giving of notice of hearing on the petition for the proposed drain, and requires such notice to be posted along the line of the drain, and that it must contain a copy of the petition, but there is no requirement that its contents shall include anything which will in any manner serve to indicate, or inform either officials or citizens of Hanson township, that a drain is proposed which shall affect it or them or to inform them that they have any interest in the subject. Hence they had no opportunity to appear and object to its establishment. This court has gone to the

limit in upholding proceedings for the establishment of drains, and the making of assessments to pay therefor, and we are satisfied that it would be going far beyond the bounds of justice and the intention of the legislature in the enactment of this statute to construe it to mean that all the property in a township may be assessed for the construction of a drain of which the officials had no notice, either personal or constructive, or by the request of any citizen of such township. While the petition may, and undoubtedly did, give the drain board jurisdiction to establish the drain, jurisdiction or power to make an assessment against Hanson township is another question. We are only concerned, in deciding this case, with the questions discussed in the briefs of the parties, and the question to which we have referred is all that we are called upon to answer; and this we may do without considering the sufficiency of the notice. That question is whether the "municipality or municipalities" involved are to be taken collectively or individually. If it satisfies the statute to have all the signers citizens of one or two of three townships affected, then, so far as the signers are material, the question must be answered in favor of the respondent; but if the statute, as worded, means that there must be signers from each of the townships which is to be assessed, then the appellant must prevail. It is apparent from the findings contained in the order and from the terms of the statute quoted, that the board was proceeding to assess the township for benefit to the public health, welfare, or convenience only. The parties hereto have cited few authorities; in fact they have cited only two cases bearing on the subject. In *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233, the supreme court of Michigan had under consideration a provision in their statute to the effect that a petition to establish a drain shall be signed by not less than five freeholders of the town or townships in which such drain, or the lands to be drained thereby and to be assessed therefor, may be situated, one or more of whom shall be owners of lands liable to be assessed for the benefits; and it was held that that provision did not require the petition to be signed by five freeholders of each township, where the drain traverses more than one township. At first impression this authority seems to sustain the order of the trial court, but on further examination we do not so construe it. In the first place the court simply held that it was not necessary to have five freeholders from each township; and in the

next place the drain under consideration, as well as the statute, related to the drainage of lands, evidently that being the main purpose of the drain rather than to benefit the health, convenience, or general welfare of the people of the township, and the drain traversed the township. But in *Chandler v. Heisler*, 153 Mich. 1, 116 N. W. 626, the same court, in construing a subsequent statute and resolution which required permission in writing, signed by at least a majority of the members of the township board or boards affected by such action of the county drain commissioner, held that they did not bear the construction that a majority of the aggregate number of the members of the township boards of the townships affected was sufficient, but that they required the signatures of a majority of the members of each of the township boards.

We consider the last case cited as direct authority for holding that there must be signers from each of the townships which it is proposed to assess; and we do so hold. This conclusion is supported not only by authority, but by all considerations of justice; and we must assume that the legislative assembly was attempting to establish a just system for the construction of drains; and the language of the statute supports our construction. From a consideration of the language of the statute relating to signers of the petition, and from these authorities, we conclude that the petition for this drain did not empower the drainage commission to make an assessment against the township of Hanson as a civil township. From statements contained in respondent's brief it appears that the purpose of building the drain was to drain a tract of land lying in Elliott township for the improvement of a highway in that township. If so, here was an indirect method adopted to secure aid by taxation of all the property in Hanson township to build or maintain a highway in Elliott township; and we are impressed with the idea that the benefit contemplated by the statute to highways in the construction of drains is such as may incidentally accrue, and that the drainage law is not intended as a primary means for the construction or repair of highways.

One other error was assigned, but as it is not discussed we do not pass upon it. The judgment of the trial court is reversed, and the case is remanded for proceedings according to law.

WHITNEY v. RITZ.

(140 N. W. 676.)

Appeals — authorized by statute.

1. Except as authorized by statute, appeals to the supreme court will not lie.

Justice court — appeals — district court — motion — order.

2. Plaintiff brought this action in justice court for damages for burning the grass on certain land. Summons was served upon the defendant personally. He appeared at the trial and participated therein. The pleadings of both parties were oral. No objection was taken because not in writing. Defendant appealed to the district court from a judgment in plaintiff's favor, and there submitted a motion to reverse and set aside the judgment of the justice court, on the ground that the damages involved in the action were for injury to real property, and that the justice had no jurisdiction because the pleadings were not in writing and verified as required by § 8392, Rev. Codes 1905.

Held, that the order denying defendant's motion was not appealable under the provisions of either subdivision 1 or 4 of § 7225, Rev. Codes 1905, as amended by chap. 79, Laws of 1907.

Pleadings — real property — justice courts — title — frivolous issues — objections — waiver.

3. The requirement of § 8392, that pleadings must be in writing and verified, in an action to recover damages for an injury to real property, was intended to prevent the raising of sham or frivolous issues as to boundaries or title to real property in justice court. Neither title nor boundary was in question, and by participating in all steps of the trial and failing to object to the fact that plaintiff's pleadings were oral, until after appeal to the district court, defendant waived his right under the statute.

4. The requirements of § 8392, above referred to, are not jurisdictional.

Opinion filed February 14, 1913.

Appeal from an order of the District Court for Morton County;
Nuchols, J.

Dismissed.

Oliver Leverson, for appellant.

Real property is such as has the characteristics of permanency of location. Tiedeman, Real Prop. § 1.

Things of a vegetable nature growing in the soil are deemed a part of the realty. *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 388.

The measure of damages for destruction of growing grass is the difference between the value of the land for the purpose for which it was used, before and after the fire. *Texas & P. R. Co. v. Land*, 3 Tex. App. Civ. Cas. (Willson) 74; *Missouri, K. & T. R. Co. v. Goode*, 7 Tex. Civ. App. 245, 26 S. W. 441.

In an action to recover damages, or for an injury to real property, the pleadings must be in writing, and verified, to give court jurisdiction. Rev. Codes 1905, § 8392; *Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565.

Where a justice has no jurisdiction over the subject-matter of the action, failure to raise such questions in such court does not waive the objection. 12 Enc. Pl. & Pr. 694; *Mastick v. Superior Ct.* 94 Cal. 347, 29 Pac. 869; *Murry v. Burris*, 6 Dak. 170, 42 N. W. 25; 8 Enc. Pl. & Pr. 171.

Where the lower court has no jurisdiction of the subject-matter, the appellate court has none. *Vidger v. Nolin*, 10 N. D. 353, 87 N. W. 593; *Kidder v. Fay*, 60 Wis. 218, 18 N. W. 839; *Plumket v. Evans*, 2 S. D. 434, 50 N. W. 961.

The appellate court cannot remand such case to the lower court. 2 Enc. Pl. & Pr. 23-452.

Where the justice has no jurisdiction because the amount claimed was too great, the district court could acquire no jurisdiction by appeal. *Wedgewood v. Charlotte*, 112 Iowa, 514, 84 N. W. 528; *Pincus v. Dowd*, 11 Mont. 88, 27 Pac. 393; *Abbott v. Kruse*, 37 Ill. App. 551.

Hanley & Sullivan, for respondent.

The order from which appeal is taken is merely an interlocutory order, and is not appealable. *Ryan v. Davenport*, 5 S. D. 203, 58 N. W. 568; *Patterson v. Ward*, 6 N. D. 359, 71 N. W. 543; *Stecker v. Railson*, 19 N. D. 677, 125 N. W. 560; 2 Cyc. 593.

Jurisdiction of a justice court is acquired by the issuance and service of a summons. Rev. Codes 1905, § 8358.

After appeal is taken to the district court, it is within the discretion of that court to allow written pleadings to be filed. *McCaffery v. Northern P. R. Co.* 22 N. D. 544, 134 N. W. 749; *Jerome v. Rusk*, 19 S. D. 263, 103 N. W. 26; *Clow v. Murphy*, 52 Iowa, 695, 3 N. W.

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723; *Bradey v. Mueller*, 22 S. D. 534, 116 N. W. 1035; *McCoun v. New York C. & H. R. R. Co.* 50 N. Y. 176; Rev. Codes 1905, §§ 6883-6886.

SPALDING, Ch. J. Plaintiff and respondent brought this action in justice court in Morton county. Defendant appeared, and on trial judgment was rendered in favor of the plaintiff. From this judgment an appeal was taken on the 14th day of November, 1910, to the district court of Morton county, and a trial *de novo* demanded. Subsequently, appellant submitted a motion in the district court to reverse and set aside the judgment entered in the justice court, upon the ground that the damages involved in the action were for injury to real property, and that the justice had no jurisdiction because no written, verified pleadings had been made and filed in the justice court. On December 22, 1911, this motion was denied. From the order denying it, an appeal is taken to this court. In the consideration of this appeal we are first met with the contention of respondent that the order from which the appeal is taken is not an appealable order, and that therefore the appeal must be dismissed. This objection is well taken. It is elementary that, except as authorized by statute, appeals will not lie. *Myrick v. McCabe*, 5 N. D. 422, 67 N. W. 143; *Tracy v. Scott*, 13 N. D. 577 (see p. 578), 101 N. W. 905; Section 7225, Rev. Codes 1905, as amended by chap. 79, Laws of 1907, defines the orders from which appeals may be taken to the supreme court of this state, as follows:

"1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

"2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment.

"3. When an order grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction, or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding, or pursuant to the provisions of § 7454 of this Code; when it sets aside or dismisses a writ of attachment for irregularity; when it grants or refuses a new trial or when it sustains or overrules a demurrer.

"4. When it involves the merits of an action or some part thereof;

when it orders judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply on account of the frivolousness thereof.

"5. Orders made by the district court or judge thereof, without notice, are not appealable; but orders made by the district court after a hearing is had upon notice, which vacate or refuse to set aside orders previously made without notice, may be appealed to the supreme court when, by the provisions of this chapter, an appeal might have been taken from such order so made without notice, had the same been made upon notice."

It is perfectly clear that this order does not come within the terms of §§ 2, 3, or 5, of § 7225, *supra*.

Does it affect a substantial right and determine the action and prevent a judgment from which an appeal might be taken? We think not. It is apparent from the wording of subdivision 1 that, to bring an order within its terms, it must not only affect a substantial right, but must also, in effect, determine the action and prevent a judgment. It is obvious that this order could in no manner prevent a judgment from which an appeal might be taken. The parties were in court, and could proceed with the trial in precisely the same manner as though this motion had not been submitted and decided. The purpose and the wisdom of this provision are apparent. It prevents multiplicity of appeals in the same action, and enables the party to secure a determination upon questions arising in the progress of litigation, prior to final judgment, on an appeal from the judgment. Otherwise all proceedings in an action might be stayed pending the determination of separate appeals from each order made during the life of the case, and a final judgment thereby prevented or postponed for years. It was well stated in *Harris Mfg. Co. v. Walsh*, 2 Dak. 41, 3 N. W. 307, when the court, speaking through Judge Moody, said: "In other words, will this court allow parties to bring their cases here by piecemeal, during the pendency of the action in the district court, and apparently for the purpose only of obtaining the opinion of this court upon a question of practice or law, and perhaps wholly unnecessary to a complete and just disposition of the cause? If by any law binding upon this court, we are compelled to perform this needless labor, we shall yield obedience to such an enactment, however disastrous, in our

opinion, it may be to the best interest of suitors, and causing, as it necessarily will, great and useless delay and expense, and enabling litigious persons to use the courts in a manner amounting frequently to a denial of justice."

Does it involve the merits of the action or some part thereof, as provided by ¶ 4? We think this motion is so analogous to the one passed upon in *Stecker v. Railson*, 19 N. D. 677, 125 N. W. 560, as to be controlled by the decision in that case where it was held that an order denying defendant's motion to dismiss an action was not appealable. This order, so far as the appellant is concerned, had the same effect as the order in that case, and it still left the action for trial and to proceed to judgment, from which all material rulings made in the course of the trial or the proceedings leading thereto could be reviewed. For a more extended discussion of the question, as to what orders are appealable, see *Olson v. Mattison*, 16 N. D. 231, and note 112 N. W. 994; *Bolton v. Donovan*, 9 N. D. 575, 84 N. W. 357; *Northern P. R. Co. v. Barlow*, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912 C, 763; *McMahon v. Davidson*, 12 Minn. 357, Gil. 232.

Our conclusion on this question disposes of appellant's appeal, but in view of his insistence that the want of written pleadings on the trial in justice court deprived that court of jurisdiction, we may properly add that we think this is a mistake. Section 8378, Rev. Codes 1905, provides that pleadings in a justice's court may be oral or written, and need not be verified unless otherwise specially prescribed. Section 8392 provides that pleadings must be in writing, and be verified in an action of forcible detainer, or in an action to recover damages for an injury to real property. This action is for damage to uncut grass, and it is claimed that it is for injury to real property. Assuming this to be so, did failure to comply with the requirements of § 8392, *supra*, deprive the justice court of jurisdiction in this case? If it did, the district court was likewise without jurisdiction. In many of the states it is required by statute that, in actions for forcible entry and detainer, a verified complaint must be filed before the justice may issue the summons. In such states it is invariably held that the complaint must be in writing and verified, and that a summons issued without the filing of such a complaint confers no jurisdiction upon the justice. But such is not our statute. It was held in

Browne v. Hazeltine, 9 S. D. 524, 70 N. W. 648, that under statutory provisions identical with those of § 8392, above, jurisdiction in forcible detainer does not depend on the filing of a verified complaint before the issuance of summons, and that it is sufficient if the complaint is filed at or before the time the defendant is required by the summons to appear and answer. And if this be correct (and we see no reason to question the correctness of this decision), we are unable to understand how, having acquired jurisdiction both of the person and the subject-matter, it is lost by the fact that both parties to the action proceed without written pleadings. Neither made objection or suggestion to the justice that such pleadings were necessary. We think they, in legal effect, waived the requirement of the statute, and that it is a requirement which may be waived by the parties, particularly when we consider what seems to us to be the object of this provision. Title and boundary to real estate cannot be tried in justice court. Issues on title and boundaries more frequently arise in actions relating to forcible and unlawful entry or detainer, and injury to real property, than in almost any other form of actions. In the interest of justice, and to permit the speedy determination of litigation it is important that frivolous or sham issues raising these questions shall not be permitted, and unquestionably the legislative mind recognized the fact that where pleadings were required to be verified, fictitious and sham issues would be much less likely to be raised than in informal, oral, and unverified pleadings. Pleadings can only be verified when reduced to writing. If this is the purpose of this provision, and the parties themselves saw fit to waive any protection afforded by the statute against fictitious issues, and none in fact are raised, we see no reason for holding that the requirement is jurisdictional. In fact it is not a question going to the jurisdiction. It is only a matter of procedure. It applies to the manner or mode of conducting the proceedings after the parties are in court. The summons gives the court jurisdiction over the defendant, and the subject of damages to real property, within the limits stated by the plaintiff in this action, was within the jurisdiction of the justice. We are, therefore, of the opinion that the court, having acquired jurisdiction, did not lose it by the fact that the parties themselves elected to proceed without written and verified pleadings. The appeal is dismissed.

IN THE MATTER OF THE APPLICATION OF SAMUEL
GALBREATH FOR A WRIT OF HABEAS CORPUS.

(139 N. W. 1050.)

Fugitive from justice — Federal Constitution — statutes — criminal process — jurisdiction.

1. To be a fugitive from justice within the meaning of § 2, art. 4 of the Federal Constitution, and of §§ 5278 and 5279 of the Revised Statutes of the United States, and § 10293, of the Revised Codes of North Dakota for 1905, it is not necessary that the person charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding prosecution anticipated or begun, but simply that within another state he committed that which, by its laws, constitutes a crime, and, when he is sought to be subjected to its criminal process for his offense, he has left its jurisdiction and is found within the territory of another state.

Habeas corpus — fugitive from justice — acquiescence — extradition.

2. Where, therefore, on an application for release under a writ of habeas corpus, the petitioner, who was charged with obtaining money under false pretenses by obtaining an indorsement upon, and the cashing of, a check drawn without funds to meet it, showed that he came to North Dakota after having had various conversations with the complaining witness, at the last of which he told the latter that "the quickest and best way for him to raise the money was for him, the petitioner, to go to Enderlin, North Dakota, where he was positive he could obtain it," and that the complaining witness said, "All right," such implied consent or acquiescence on the part of the complaining witness did not prevent him from being a fugitive from justice within the meaning of the acts and constitutional provision in question, and from being subject to extradition from the state of North Dakota.

Criminal offense — offense against state.

3. A criminal offense is an offense against the sovereign state, and not against the complaining witness. Acquiescence of the complaining witness, therefore, cannot in any manner be construed into an acquiescence or consent on the part of the state.

Opinion filed February 18, 1913.

Note.—In harmony with the decision in *Re GALBREATH*, the weight of authority, as shown by a review of the cases in a note in 28 L.R.A. 289, is to the effect that the reason why one who has committed a crime leaves the state where the crime was committed is immaterial in determining whether or not he is a fugitive from justice, the mere fact of leaving the state after the commission of the crime being sufficient.

Original application for a writ of habeas corpus.
Writ denied.

This is an application for release under a writ of habeas corpus. The petition alleges that one Samuel Galbreath, the petitioner, is unlawfully imprisoned, detained, confined, and restrained of his liberty by Frank Barnes, sheriff of Burleigh county; that on the 13th day of February, 1913, he was arrested as a fugitive from justice, within the state of North Dakota, by virtue of a warrant issued by the governor of the state of North Dakota, upon requisition by the governor of the state of Minnesota, and that such arrest, confinement, imprisonment, and detention was unlawful in that no proper warrant had been issued by the governor of the state of North Dakota. The crime charged was that of obtaining money under false pretenses in the state of Minnesota, by obtaining an indorsement upon, and the cashing of, a check drawn without funds to meet it, upon a bank in North Dakota.

C. G. Bangert, Enderlin, North Dakota, for petitioner.

H. R. Berndt, States Attorney, Bismarek, North Dakota, and *Erland Lind*, Minneapolis, Minnesota, for respondent.

BRUCE, J. (after stating the facts as above). The petitioner contends in this case that he is not a fugitive from justice within the terms and meaning of § 2, art 4, of the Federal Constitution, and of §§ 5278 and 5279 of the Revised Statutes of the United States, and of § 10293, Rev. Codes 1905, of North Dakota. Upon the examination he sought to prove that, after the check in question went to protest, he had several conversations on different days with the complaining witness, during the last of which he told the latter that the quickest and best way to raise the money was for him, the petitioner, to go to Enderlin, North Dakota, where he was positive he could obtain it. and that the complaining witness said "All right;" that he left Minnesota at 11 o'clock that night and came to North Dakota; that he left Minnesota on the 24th of January, and arrived at Enderlin, North Dakota, on the 25th; that his brother, from whom he hoped to get the money, lived 7 miles out of Enderlin, and that upon his arrival he called him up by telephone, but was informed that he was not at home; that he

did not make any further inquiry until about two weeks afterwards, when he was informed by the constable at Enderlin that he was wanted in Minneapolis, and on the following morning a deputy sheriff from Minneapolis came to take him back to Minnesota. He says that up to that time he made no effort to return the money, but that after his arrest by the deputy he had a conversation with the county attorney, and offered to pay the money, and that at the time of the application, he had the money with which to pay the demand, having raised it after his arrest, and four or five days before the hearing. He also testified that prior thereto, and on the next day after his arrival in North Dakota, he wrote to the complaining witness and told him that his brother was not at home; and that he was waiting and would see him as soon as possible and raise the money; that his brother did not get back to Enderlin until Saturday, a week before the hearing, and that during this time he received no word from the complaining witness in Minnesota. He claims, in short, that he came to North Dakota with the consent of the complaining witness, and in order to raise the money, and not for the purpose of fleeing from justice, and that in order to come within the statutes he must be proved to have actually fled from the state of Minnesota for the purpose of avoiding arrest and punishment.

We are fully satisfied that the petitioner is mistaken in his view of the law, and that a careful perusal of the authorities and of the history of the adoption and construction of the constitutional provision, and of the act of Congress, will show that to be a fugitive from justice within the meaning of the act of Congress, it is not necessary that the person charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding prosecution, anticipated or begun, but simply that within another state he committed that which, by its laws, constitutes a crime, and when he is sought to be subjected to its criminal process for his offense he has left its jurisdiction and is found within the territory of another state. *Roberts v. Reilly*, 116 U. S. 97, 29 L. ed. 549, 6 Sup. Ct. Rep. 291; *Ex parte Brown*, 28 Fed. 653; *Re Keller*, 36 Fed. 681; *Re White*, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54; *State ex rel. Burner v. Richter*, 37 Minn. 436, 35 N. W. 9.

A perusal of the cases, indeed, and of Mr. Moore's admirable dis-

cussion of the subject in chap. 4, of his work on Extradition, will show that this has been the practically uniform construction of the statute and of the constitutional provision from the earliest times. It is the theory followed in practically all of the treaties of the United States, and is the theory of practically all of the decisions. Counsel for petitioner, it is true, cites us to § 569 of Moore on Extradition, in which reference is made to a case where the governor of South Carolina demanded the surrender, from the District of Columbia, of John J. Patterson, a United States Senator from the former state, and in which Senator Patterson was released on a writ of habeas corpus. That case, however, if authority at all, is not authority in the case at bar. The Senator had been sent to Washington, not by the complaining witness or by any private individual, but by the sovereign state of South Carolina, itself, as its representative in Congress. We must remember that a criminal offense is an offense against the sovereign state, and not against an individual; and that no individual, not even the complaining witness, has the power or authority to control the action of his sovereign, whose dignity alone is sought to be vindicated. It may be that when the sovereign state sends an alleged criminal out of its borders, it is precluded from treating him as a fugitive from justice, but the reasoning does not apply where a private individual is the only one whose consent is pretended to have been obtained. We realize that our holding may be opposed in principle to that of our sister state in the case of *Re Todd*, 12 S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303, and with *Spear on Extradition*, 3d ed. 381, but we are satisfied that it is sustained by the overwhelming weight of authority.

The writ is denied.

BURKE, J., being disqualified did not participate.

STATE Ex Rel. NYHUS v. ROSS.

(139 N. W. 1051.)

Action — damages — seduction — arrest.

1. An action by the father to recover damages for the seduction of his minor daughter is an action for "an injury to person" within the meaning of § 6890, Rev. Codes 1905, authorizing the arrest of the defendant.

Relief — habeas corpus.

2. Mere errors and irregularities which do not render the proceedings void are not grounds for relief by habeas corpus.

Defendant — jail — payment of board.

3. Defendant, who is incarcerated in jail under a body execution issued upon a judgment rendered for the seduction of plaintiff's daughter,

Held, not entitled to be liberated on habeas corpus upon the alleged ground of plaintiff's failure to pay for his board within twenty-four hours after a demand therefor by the sheriff or jailor.

Opinion filed February 21, 1913.

Relator, who is detained in the jail of Cass county under an execution issued against his body, applied to the Supreme Court for the issuance of a writ of habeas corpus. Such writ was issued as prayed for, and respondent made due return thereto. Upon a hearing on the merits, the writ is quashed.

Chas A. Lyche, Hatton, North Dakota, for relator, *Engerud, Holt, & Frame* and *Lawrence & Murphy*, Fargo, North Dakota, of counsel.

J. M. Johnson, Sharon, North Dakota, and *A. T. Cole*, Fargo, North Dakota, for respondent.

FISK, J. A writ of habeas corpus was issued out of this court on the petition of relator, returnable on the 14th inst., commanding respondent as sheriff of Cass county to appear and show by what authority he detains and imprisons such relator in the jail of such county. On

Note.—That an action for seduction is an action for "injury to the person" within the meaning of a statute permitting arrest of defendant in such an action is also declared in the case of *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397, which is cited and discussed in a note in 59 L.R.A. 957, on the question of the right to order of arrest in a suit for breach of promise.

the return day, respondent made due return to such writ as follows:

"Comes now J. C. Ross, sheriff of Cass county, North Dakota, and in obedience to the mandate of this court respectfully shows:

I.

"That the petitioner, Henry Nyhus, was committed to his care and custody on the 4th day of February, 1913, by order of Honorable Charles A. Pollock, judge of the third judicial district of the state of North Dakota, as set forth by copy and attached to the petition of said Henry Nyhus herein and marked Exhibit D of said petitioner.

II.

"That said Henry Nyhus is still in my custody, pursuant to the order of the said Honorable Charles A. Pollock as set forth in said Exhibit D, and that the board and expenses for his board has been duly paid by J. M. Johnson, attorney for Stephanus Skoglund, plaintiff, in the proceedings out of which this matter arose, and that the board for said Henry Nyhus is paid up to and including the 24th day of February, 1913.

III.

"That said Henry Nyhus is being held subject to the further order of said Judge, Honorable Charles A. Pollock, or until he shall be discharged by lapse of time, or until the plaintiff in the action out of which this proceeding arose shall fail and refuse to pay the board and expenses for board for said petitioner, and be entitled to his liberty by virtue of the statutes in such case made and provided.

IV.

"That the action out of which these proceedings grew was an action by the plaintiff, Stephanus Skoglund, against the petitioner, Henry Nyhus, for seduction of the minor daughter, Olava, of said Stephanus Skoglund, wherein said Skoglund obtained a judgment for a substantial sum against said Henry Nyhus, the petitioner, which judgment is still in full force and effect and unpaid and not settled, and wherein an execution has heretofore been issued for the collection of said judgment and returned unsatisfied, and thereafter a body execution issued

for said Henry Nyhus, the petitioner, as appears by Exhibit A attached to the petition of the petitioner herein."

It appears from the record that Steele county, wherein petitioner resides and was arrested under the body execution, has no jail, and that pursuant to an order of his Honor, Judge Pollock, the Traill county jail was designated as the place for the incarceration of petitioner under such execution pursuant to the provisions of § 10433, Rev. Codes 1905. The amendment of such statute by chapter 108, Laws 1911, was not called to the attention of the judge, and was overlooked. Under such amendment the jail of Cass county was the proper place for the confinement of the execution debtor. On February 1st a writ of habeas corpus was issued by the district judge on relator's petition, returnable February 4th, and on such return date an order was made by such judge, from which order we quote the following:

"Now, after hearing counsel and giving such consideration to the matter as the court has had time to give, the court finds all of the contentions not well taken, save and except that the defendant should have been incarcerated in the county jail of Cass county, instead of that of Traill county, under what appears to be a mandatory provision of chapter 108 of the Laws of 1911, with which statute the court states he was entirely unfamiliar at the time of the incarceration, and his attention not having been called to it until the time of this hearing.

"In view of the foregoing, the petition is granted for the discharge, but deeming the defendant not entitled to his discharge upon the merits, it is further ordered that the defendant be incarcerated in the county jail of Cass county until released in due compliance with law; and a copy of this order shall be the commitment to the Sheriff of Cass county and his authority for holding the defendant."

Counsel for petitioner urge in this court four grounds why he is entitled to his liberty: First, they contend that he is being held without legal process; second, such contention is illegal, because no discharge is permitted except upon an order of court; third, he is illegally held because of neglect of creditor to pay for his board as required by the sheriff; and fourth, that a body execution cannot lawfully be issued in an action for seduction.

The last contention is the one chiefly relied on, and will be noticed first. Section 6890, Rev. Codes 1905, provides that "the defendant

may be arrested . . . in the following cases: 1. In an action for the recovery of damages for an injury to person or character, or for injuring or for wrongfully taking, detaining, or converting property. . . ." Section 7103 provides that, in an action in which a defendant may be arrested as provided in §§ 6890 and 6892, an execution may be issued against the person of the judgment debtor, etc.

Counsel's fourth contention squarely presents the question whether an action by a father to recover damages for the seduction of his daughter falls within the provisions of subdivision 1 of § 6890, above quoted, so as to authorize the issuance of a body execution against the judgment debtor. Such question has not heretofore arisen in this state so far as we are aware. Counsel for petitioner cites and relies upon the case of *Wagner v. Lathers*, 26 Wis. 436, decided under a statute the same as ours. The case seems to stand alone as an authority in petitioner's favor, and holds that an action for the seduction of plaintiff's daughter is not one "for an injury to the person or character," and defendant therein is not liable to arrest. Two early New York cases, which we will hereafter refer to, holding to the contrary, are criticized by the Wisconsin court; and while the reasoning of the opinion is quite persuasive, we are agreed that the sounder and better rule is as announced by the New York cases. *Delamater v. Russell*, 4 How. Pr. 234, and *Straus v. Schwarzwalden*, 4 Bosw. 627. The Wisconsin case was decided in the year 1870, since which date *Steinberg v. Lasker*, 50 How. Pr. 432, was decided, following the prior New York decisions and citing two other cases. Also the case of *Hoover v. Palmer*, 80 N. C. 313, which was decided in 1879, based upon a similar statute which was borrowed from New York and approving of the New York holdings. The opinion in the latter case contains, among other things, the following language: "Blackstone, in his Commentaries, and indeed all the elementary writers, divide rights into two kinds,—such as concern or affect the person, called *rights of person*, and such as concern things, which are foreign to the person, called *rights of things*. The cases, *rights of person*, is subdivided into rights of person absolute, being such as belong to one, individually and separately considered, and rights of person *relative*, being such as extend to one in relation to and connection with others. Under this classification of rights, criminal conversation and seduction are enumerated and treat-

ed of by the law writers as injuries to, and included within the class of, the relative rights of person of a husband and parent. 3 Bl. Com. 138; 2 Kent, Com. 1295; 1 Chitty, Pl. 137. The section of the Code under consideration, after providing for arrest in actions *ex contractu* as against a nonresident, and one about to remove from the state, authorizes an arrest in causes of action not arising out of contract, in language broad enough to include all actions *ex delicto*, and then particularizes actions for injury to person, character, and property in the latter branch of the subdivision, with a further enumeration of the instances in which arrests may be made in other subdivisions. On reading the whole question, it is difficult to adopt the construction contended for by the defendant. Such a construction involves the absurdity of the legislature's intending to subject a trespasser or a tortfeasor to give bail for his appearance, and answer to an action in respect of property of insignificant value; while no security can be had for the forthcoming of a seducer to answer an action for debauching a daughter. We think it was not so intended, and the words of the statute do not demand such a construction. It is fair to conclude that the legislature, in providing for arrest and bail in an action for injury to person, used those words—"injury to person"—according to their established legal signification in the classification of rights and injuries thereto as taught in the elementary writers, and, thus considered, the language employed in legal effect authorized, as we think, an arrest for all those injuries (seduction included) which may be suffered in respect of any rights of person, absolute or relative. This, we hold, was intended to be and is the proper construction of the section of the Code of Civil Procedure in question. The same construction is given in New York from which the section under consideration was copied. *Delamater v. Russell*, 4 How. Pr. 234; *Steinberg v. Lasker*, 50 How. Pr. 432."

In this connection we here call attention to § 4030, Rev. Codes 1905, treating of offenses against the relative rights of persons. It provides: "The rights of personal relation forbid:

"1. The abduction of a husband from his wife or of a parent from his child.

"2. The abduction or enticement of a wife from her husband, of a child from a parent or from a guardian entitled to its custody, or of a servant from his master.

"3. The seduction of a wife, daughter, orphan sister, or servant; and

"4. Any injury to a servant which affects his ability to serve his master."

We think it strange that the legislature should provide for arrests of a tortfeasor who has merely violated some property right, and not authorize an arrest for violations of one's personal rights, both absolute and relative; nor do we think a fair interpretation of the whole statute requires such a construction. A construction permitting arrest for conversion of property, and which denies such remedy to an injured parent whose daughter has been seduced, is so absurd that we cannot believe the legislature intended any such construction.

At the time we borrowed our Code of Civil Procedure from the state of New York in 1868, § 6890, *supra*, had received a settled construction by the New York courts, and it will therefore be presumed that, in adopting such statute, we adopted such settled construction; and were we in doubt (which we are not) as to the correctness of such construction, we would feel it our duty, nevertheless, to follow the New York precedents, leaving it to the legislature to change the rule, if in its wisdom a different rule should prevail.

We have considered the other contentions urged by counsel for relator, and deem them without substantial merit.

While the execution under which relator was arrested and was detained in custody is irregular in directing him to be incarcerated in the jail of Traill county, such irregularity does not go to the jurisdiction, even though chapter 108, Laws 1911, be construed as mandatory. The execution was not a nullity, and it was the duty of the presiding judge of the court out of which such execution was issued, to cause relator to be incarcerated in the proper jail pursuant to law, and it was entirely proper for such judge to make the order directing the transfer of the debtor to the Cass county jail, even though such order in effect operated to amend the execution in so far as the designation of the jail was concerned. This at most was an irregularity which cannot be taken advantage of by habeas corpus. It is contended by counsel that his Honor, Judge Pollock, at the hearing of the habeas corpus proceedings before him, released petitioner from arrest, and that he is now being held solely by virtue of the order made at such hearing. We think counsel are in error in such contention. It is true the judge in such order uses

the words: "The petition is granted for the discharge, but deeming the defendant not entitled to a discharge upon the merits, it is further ordered that he be incarcerated in the county jail of Cass county until released in due compliance with law; and a copy of this order shall be the commitment to the sheriff of Cass county and his authority for holding the defendant."

Such language, when properly construed, does not, in substance or effect, constitute a release or discharge of the execution debtor at all. It merely amounts to a direction for a change of the place of incarceration from Traill to Cass county. At the time of the issuance of the writ by this court, the relator was detained in the jail of the latter county by virtue of the execution and in pursuance of such order. Nor is there any substantial merit in the contention that by such order the jailor of Cass county was required to keep the relator for a longer time than the law requires; but even if so, he is not entitled to be liberated by habeas corpus until such time as, by operation of law, he is entitled to his liberty.

But it is earnestly contended that he is, and has been for a long time, entitled to his freedom by operation of law, because, as counsel assert, the plaintiff, on demand of the jailer of Traill county, refused and neglected to pay for his board. Whether, if such facts be established, it would afford petitioner ground for a discharge in a habeas corpus proceeding, we need not here determine, for no such state of facts is disclosed. On the contrary it affirmatively appears that such board was paid by or on behalf of plaintiff promptly after the demand was served for the payment thereof. This is shown by the affidavits of the sheriff and of J. M. Johnson, the creditor's attorney. The demand was made by registered mail, and the letter containing such demand was mailed at Hillsboro January 28th, and, according to the registry receipt in evidence, was not received by the creditor at Hope, to which place it was addressed, until January 30th. It appears that the payment of such board bill was received on February 4th, and presumably was remitted by mail. From all that appears from the record such remittance may have been deposited in the United States mail within twenty-four hours after the receipt of such demand. If so, this surely would have been a sufficient compliance with the statute, even under the most strict construction. The fact that the remittance did not reach the sheriff until

February 4th may therefore be easily accounted for, as it could not have reached Hillsboro before Sunday the 2d, or Monday the 3d of February. It may have been delayed in transit or not called for by the sheriff promptly on its arrival at Hillsboro. But however this fact may be, we are agreed that the statute was in good faith substantially complied with by the creditor, and that it would be highly technical to discharge the petitioner on such ground. We have examined the authorities cited by petitioner's counsel on this point, but we are inclined to favor as the more reasonable rule that announced by the California court in *Ex parte Lamson*, 50 Cal. 306.

It results from these views that the writ must be quashed and the prisoner remanded. It is so ordered.

STATE v. FLEMING.

(140 N. W. 674.)

Merchant — goods — buyer and seller.

1. A merchant is one who buys to sell, or buys and sells, goods or merchandise in a store or shop.

Transient merchant — license — vending — temporary place.

2. Chapter 201, Laws of 1911, requires transient merchants to pay a license

Note.—By holding that one selling his own products is not a "merchant," the court in this case avoided the necessity of deciding the question whether the statute would be unconstitutional if construed to include such a person. That an ordinance by the terms of which a farmer is in effect prohibited from selling the products of his farm, with the exception of milk, fish, and game, without first taking out a license from the city, is invalid, was declared in *Re Snyder*, 10 Idaho, 682, 68 L.R.A. 708, 79 Pac. 819. And that the exemption from a license statute of people peddling their own products does not render the statute invalid has been decided in *Rosenbloom v. State*, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053. But the contrary conclusion was reached in *State ex rel. Luria v. Wagener*, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67. The latter case is, however, distinguished by the court in the *Rosenbloom Case* on the ground that the statute construed in that case was held to be a police regulation, having for its object the protection of the public, while the classification in the statute considered in the *Rosenbloom Case* was made for the purpose of taxation, and not for the purpose of regulating the business of peddling.

24 N. D.—38.

to the state and a local license to any town, village, or city within which they may do business. A transient merchant is one who engages in the vending or sale of merchandise at any place in this state temporarily, and who does not intend to become, and does not become, a permanent merchant of such place, as defined by the act. *Held*:—

(a) That, under this definition a transient merchant is a merchant who buys and sells merchandise, and whose sales are made at a place in this state temporarily, and who does not intend to become, and does not become, a permanent merchant of such place.

(b) That a person who grows his own fruit and ships it into this state, and sells it at retail from a car placed on a side track within the limits of a village, is not a merchant, and is therefore not a transient merchant within the prohibition of said chapter.

Vending from car — village — merchant — transient merchant — statute interpretation — farm products — vending of same — license.

3. The terms of the law in question clearly apply equally to growers of the products of farms situated within this state and taken into villages and cities for sale, as to such growers in other states who ship into this state for sale. *Held*, that this court will not, unless the terms of the statute make any other interpretation impossible, hold that it was intended to prevent the producers of this state from marketing the products of their farms in villages and cities without the payment of the license fees imposed.

Opinion filed February 26, 1913.

Appeal from an order of the District Court for Grand Forks County,
Templeton, J.

Reversed.

A. C. Lacy and Edgar E. Sharp, for appellant.

One who grows his own fruit, and ships it into this state, and sells it from a railroad car within the limits of a village, is not a merchant. *Re Ware*, 53 Fed. 783; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 471-473, 24 L. ed. 527, 530, 531; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 474-508, 31 L. ed. 703-715, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Henderson v. New York*, 92 U. S. 271, 23 L. ed. 548; *Foster v. Blue Earth County*, 7 Minn. 140, Gil. 84; *Hall v. DuCuir*, 95 U. S. 485, 24 L. ed. 547.

The shipments made in this case constitute interstate commerce. The statute is unconstitutional. *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; 4 Words &

Phrases, §§ 3724, 3731; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; 8 Fed. Stat. Anno. p. 425; United States v. Gould, 8 Am. L. Reg. 525, Fed. Cas. No. 15,239; McGregor v. Cone, 104 Iowa, 465, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041; State v. Intoxicating Liquors, 83 Me. 158, 3 Inters. Com. Rep. 581, 21 Atl. 840.

Goods shipped into this state must become mingled with the general property of the state, before the power to tax commences. Lasater v. Purcell Mill & Elevator Co. 22 Tex. Civ. App. 36, 54 S. W. 425; 8 Fed. Stat. Anno. p. 429; Guckenheimer v. Sellers, 81 Fed. 997.

The state cannot, under the guise of inspection or revenue, forbid or impede the importation of food products which are harmless. Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.

The law is unconstitutional because it interferes with and abridges the rights and privileges of citizens of this state and citizens of the several states. Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The law is unconstitutional because it embraces subjects and matters not expressed within its title. N. D. Const. § 61.

The law is unconstitutional because it seeks to impose a tax without distinctly stating its object. N. D. Const. § 175; State v. Klectzen, 8 N. D. 286, 78 N. W. 984, 11 Am. Crim. Rep. 324.

The appellant was not a transient merchant. Torrey v. Showano County, 79 Wis. 152, 48 N. W. 246; Crater v. Deemer, 4 Pa. Co. Ct. 375; Rosenbaum v. Newburn, 118 N. C. 83, 32 L.R.A. 123, 24 S. E. 1; 27 Cyc. 478; Com. v. Brinton, 3 Pa. Dist. R. 783; New Orleans v. LeBlanc, 34 La. Ann. 596; Overall v. Bezeau, 37 Mich. 506; Barton v. Morris, 10 Phila. 360; Lansdale v. Brashear, 3 T. B. Mon. 330; Dyott v. Letcher, 6 J. J. Marsh. 541; Com. v. Gardner, 133 Pa. 284, 7 L.R.A. 666, 19 Am. St. Rep. 645, 19 Atl. 550; N. D. Pol. Code, 1905, Sec. 1501.

Andrew Miller, Attorney General, and *O. B. Burtness*, State's Attorney, for respondent.

This law not only applies to nonresidents of the state, but to all other persons, without discrimination. *Re Lipschitz*, 14 N. D. 622, 95 N. W. 157.

The law does not interfere with interstate commerce. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

The state contends that the original package, in this case, consisted of the entire car of goods; that when such car was broken, the original package was broken. *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 992; *Ficklen v. Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed 538, 24 Sup. Ct. Rep. 365; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *Rosenbloom v. State*, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053; *People v. Smith*, 147 Mich. 391, 110 N. W. 1102; *State v. Thompson*, 25 S. D. 148, 125 N. W. 567; *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; *State v. Wheelock*, 95 Iowa, 577, 30 L.R.A. 429, 58 Am. St. Rep. 442, 64 N. W. 620; *Queen City F. Ins. Co. v. Basford*, 27 S. D. 164, 130 N. W. 44; *Davis v. Macon*, 64 Ga. 128, 37 Am. Rep. 60; *West v. Mt. Sterling*, 23 Ky. L. Rep. 1670, 65 S. W. 120; *Com. v. Gardner*, 133 Pa. 284, 7 L.R.A. 666, 19 Am. St. Rep. 645, 19 Atl. 550; *Ex parte Robinson*, 12 Nev. 263, 28 Am. Rep. 794; Note in 129 Am. St. Rep. 251.

Exemption from taxation on business within this state cannot be claimed on the ground that the products sold may be used in commerce. 7 Enc. U. S. Sup. Ct. Rep. 433; 25 Cyc. 604, 612; *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 992; *Ficklen v. Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

The tax is sustained on the ground that, after the property has reached its destination and has been offered for sale, it has become a part

of the general mass of property within the state. *Brown v. Houston*, 114 U. S. 622-634, 29 L. ed. 257-261, 5 Sup. Ct. Rep. 1091; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266.

SPALDING, Ch. J. The defendant was informed against, charged with violating the provisions of chapter 201, Laws of 1911. The information sets out the facts fully. It was so drawn to enable the courts to pass upon the validity of the statute referred to. As far as material it states that on the 27th of September, 1911, in the village of Niagara, in the county of Grand Forks, the defendant committed the crime of engaging in the occupation of a transient merchant without first obtaining a license authorizing him to do so; that the crime consisted in selling apples in bulk with no covering, from a box car on the Great Northern tracks in said village, which apples belonged to defendant's employer, one Vandeventer, a resident of Missouri, and who raised the same in his own orchard in the state of Missouri and shipped them from that state to the village of Niagara, consigned to himself, for the purpose of selling them, as set out, all without any intention to become, and without becoming, a permanent merchant of said village of Niagara, and without obtaining from the secretary of state of North Dakota a license authorizing him to so sell such apples. The statute in question requires transient merchants to secure a license for conducting their business or occupation in this state. The license is required to be procured from the secretary of state, and the price fixed therefor is \$75. The statute also requires the payment of a sum not exceeding \$25 per day to the treasurer of the city or village where he is conducting his business, and contains other provisions, not necessary here to be noted, further than the definition contained therein, that a transient merchant is one who engages in the vending or selling of merchandise at any place in this state temporarily, and who does not intend to become, and does not become, a permanent merchant of such place.

The information was demurred to on the following grounds:

1. That the court has no jurisdiction of the offense charged therein.
2. That the facts stated in said information do not constitute a public offense.
3. That it contains matter which, if true, would constitute a legal bar to the prosecution, in this, that it shows upon its face that the apples so sold by the defendant were, at the time of the sale thereof, the subject of interstate commerce, and that in so selling such apples the defendant was engaged in interstate commerce, and was not subject to any license or tax by the state of North Dakota contravening the right of Congress to regulate interstate commerce.

The demurrer was overruled, defendant pleaded guilty. A motion in arrest of judgment was submitted upon the same grounds stated in the demurrer. This was overruled and denied. The case is here on appeal from the order overruling the motion in arrest of judgment.

Several errors are assigned which are directed toward testing the constitutionality of the statute referred to, and it is also urged that the defendant is not a transient merchant within the meaning of the statute. From our view of the law the last-mentioned question is the only one which may be properly determined at this time. We are satisfied that the contention of appellant on this point is well taken; and that by no construction of the language of the statute, and the definition it contains of a transient merchant, can defendant be held to come within that term. At first glance it would seem as though, under the definition given, he is any person who engages in the selling of merchandise, and that, if apples may be termed merchandise, the defendant is included within this definition; but further inspection discloses the fact that the "transient merchant" is, by the definition, placed in contrast with the permanent merchant; that the definition is intended to distinguish the transient merchant from the permanent merchant; that is, the transient merchant is a *merchant* who engages in the sale of merchandise at a place temporarily, not intending to become, and not becoming a permanent merchant of such place. It follows from this that it is not only the fact of selling merchandise, but the intention or fact of not becoming a permanent merchant, that identifies the transient merchant, and that in either case he must be a merchant. This leads to a consideration of the definition of the word "merchant." Formerly

the word seems to have applied to wholesalers only, but we take it that this was with reference to the conduct of business in England, and perhaps in the early days of this country when the man who is now designated as a retail merchant was—and in some places still is—called a shopkeeper. It then served to distinguish between the wholesaler and the retailer; but under modern usage in this country, and certainly in this state, such distinction is no longer maintained. The man who runs a retail store is not commonly spoken of here as a shopkeeper, but rather as a merchant. In the light of these considerations, we think we are able to determine which of the several definitions of a merchant found in the dictionaries and other works applies to present conditions in this locality. In Webster's New International Dictionary we find the definition as one who carries on a retail business, a storekeeper or shopkeeper; and in Webster's International Dictionary, one who keeps a store or shop for the sale of goods, a shopkeeper; and in the Century Dictionary, one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit. The Century Dictionary also distinguishes and says: "One who sells without having bought, as where one sells products of his own labor, is not usually termed a merchant."

"The term 'merchant' includes all who buy and sell any species of movable goods for profit." *Rosenbaum v. Newbern*, 118 N. C. 83, 32 L.R.A. 123, 24 S. E. 1. And *Kinney's Law Dictionary* says the term "merchant" has been defined to be, strictly, a buyer, but by extension, one who buys to sell or buys and sells, one who deals in the purchase of goods, a dealer in merchandise, a trader.

From these definitions, and those from many other authorities which might be cited, it would seem that two essentials are necessary to constitute one a merchant, in the ordinary meaning of the word; namely, that he must buy and sell, and that he must keep a shop or store for that purpose. For the purposes of this case it is not necessary to decide whether the car was a store or shop. The facts applied in the case at bar exclude the defendant from these definitions. He did not buy, he grew and sold. See also 27 Cyc. 478. We conclude that a transient merchant, within the meaning of the statute referred to, is a merchant who sells merchandise temporarily at a place in this state without intending to become, and without becoming, a permanent merchant of

such place. Buying is an essential element, but the buying need not be done at the same place where the sales are made. And we conclude that the defendant was not a transient merchant.

In addition to the definitions and authorities to which reference has been made, our conclusion is verified by a consideration of certain results which would necessarily follow if this defendant were held to be a transient merchant within the meaning of chapter 201, *supra*. These results are such that it can hardly have been within the intent of the legislative assembly to have enlarged the definition so as to include defendant within its meaning. If he is included, it means that every farmer living outside the limits of any village or city in this state, selling and delivering to an inhabitant of the city or village a load of potatoes or of wood, a basket of eggs, or any other of the products on his farm, would be required to pay not only a license of \$75, but such additional fee as might be prescribed by the local village or city authorities, not exceeding \$25 for every day when he sold any such commodity. It would practically deny to the farmer or producer the right to market either his dressed or live pork in any village or city within the state. It would close local markets to his butter and milk. It would likewise prevent the disposition of farm products to the wholesale buyer. In fact, it would so limit the right to exercise the power to sell that the occupation of farming would, in a large measure, be destroyed, and the residents of villages and cities rendered almost entirely dependent upon shipments of food, fuel, and different forms of merchandise. It is clear that no such results were contemplated or intended. We may add that it is conceded by counsel that if the terms of this statute are applicable to the defendant, they are universally applicable, and apply as well to growers of fruit and other products of the farms of the state as to those produced and shipped in from other states or countries, and we see no reason to question the correctness of this admission.

The order of the District Court is reversed, with directions to discharge the defendant.

JACKSON et al. v. CITY OF GRAND FORKS, a Municipal Corporation.

(45 L.R.A.(N.S.) 75, 140 N. W. 718.)

Liability of city — damages — sidewalks — snow and ice.

1. A city may be held liable in an action for damages where the evidence, of, at least, some of the witnesses, which is believed by the jury, shows that a portion of a sidewalk has remained covered with ice and snow during the whole winter, and such ice and snow has been allowed to thaw and freeze and accumulate during such time, and no effort has been made by the city either to remove it, or cause the same to be removed, or to sprinkle it with sand or other substance in order to render it less dangerous; and the evidence also shows that such ice and snow was trampled into ruts, mounds, humps, and hillocks by the pedestrians during a thaw, and frozen in such condition, and that after a snow storm which later fell upon and largely hid the same, plaintiff slipped and fell thereon.

Sidewalks — defective condition — knowledge of — contributory negligence.

2. A traveler is not required to forego traveling upon a sidewalk merely because he has knowledge that it is in a somewhat defective condition. He has, as a general rule, a right to assume that it is safe, and when he is injured as a consequence of a defect of which he had previous knowledge, the mere fact of his previous knowledge does not *per se* establish contributory negligence.

Contributory negligence — question of fact — jury — undisputed facts.

3. The question of contributory negligence, whether it be of a defendant or the alleged contributory negligence of the plaintiff, is primarily and generally a question of fact for the jury. The question becomes one of law,

Note.—The holding in JACKSON v. GRAND FORKS, as to the liability of a municipality for injuries from rough or uneven snow or ice accumulated from natural causes on a street or sidewalk not otherwise defective, is in harmony with the general rule, as shown by a review of the authorities in a note appended to this case as published in 45 L.R.A.(N.S.) 75, and in a preceding note in 13 L.R.A.(N.S.) 1105.

As to liability of municipality for injuries from smooth, level ice or snow accumulating from natural causes on a sidewalk, see note in 7 L.R.A.(N.S.) 933.

As to liability for injuries caused by freezing of water accumulating on walk by reason of artificial condition, see note in 20 L.R.A.(N.S.) 201.

As to effect of knowledge of obstruction or defect in highway or sidewalk on the question of contributory negligence of one injured, see note in 21 L.R.A.(N.S.) 638.

authorizing the withdrawal thereof from the jury, only when but one conclusion can be drawn from the undisputed facts.

Notice to city — continuance of obstruction — sidewalks.

4. Notice to the city, in such a case, is sufficiently shown by proof of the long continuance of the accumulation.

Evidence — city charter — ordinances — assumption of control of sidewalks — pleading.

5. In an action against the city in such a case, it is not error to introduce in evidence the charter of the city, which gives it the power to require the owner or occupant of any premises to keep the sidewalks in front of and along the same free from snow or other obstruction, or the ordinances of the city which provide that the owners and occupants of the land shall clear the sidewalks of all accumulations of snow and ice within ten hours after the same have fallen or accumulated under liability to a fine, the court being justified in assuming that such charter and ordinances were introduced, not for the purpose of prejudicing the jury and making them believe that the owner or occupant would be ultimately liable in the action, but for the purpose of showing an assumption of control by the city, and its construction of its duty in relation to the sidewalks in question, as well as the right of the plaintiff to rely upon such assumption.

Such evidence may be introduced, even though the ordinances and charter are not specially pleaded. Charter provisions and ordinances need only be pleaded when a violation of them is the foundation of the action.

Opinion filed March 3, 1913.

Appeal from the District Court for Grand Forks County; *Templeton, J.*

Action against the City to recover damages resulting from personal injuries sustained in slipping and falling on an icy sidewalk. Judgment for plaintiff. Defendant appeals.

Two separate actions were brought in the district court of Grand Forks county against the City of Grand Forks,—one by Lena Jackson, and the other by J. W. Jackson, her husband. One was to recover damages for personal injuries sustained, and the other was an action by the husband to recover for the loss of the services of his wife, medical expenses, etc., occasioned by said injury. The jury returned verdicts in both cases in favor of plaintiffs, and from the orders denying defendant's motion for judgment notwithstanding the verdict, and in

the alternative, for new trials, and from the judgments entered thereon, the defendant appeals. The two cases were tried together, as the facts were in every way similar, and no question having been made as to the allowance of damages, and the points raised on this appeal being directed merely to the question of liability, that is, of negligence, and the admission of evidence and the instructions of the court in relation thereto, the two cases can be discussed and decided together.

The material parts of the complaints, and which, alone, need be considered here, are as follows: "That among others, there devolved upon the defendant as such city, so organized as hereinbefore set forth, the duty of keeping and maintaining said sidewalk hereinbefore set forth along said Kittson avenue, in a reasonably safe condition for public travel by pedestrians; that notwithstanding its duties in that regard and in violation thereof, the defendant did negligently and carelessly permit, after notice thereof, the said sidewalk to be and become in a dangerous and unsafe condition for public travel by pedestrians as hereinafter set forth.

"That on the 5th day of February, A. D. 1908, the sidewalk on the south and southerly side of said Kittson avenue, along and in front of the northerly side of said block 29, along which sidewalk all of the perestrians as hereinbefore set forth usually traveled, was in a defective, unsafe, dangerous, and obstructed condition, by reason of the negligence of the authorities of the defendant, with respect thereto, in that and because the said city authorities had negligently and carelessly accumulated, or permitted to accumulate and negligently and carelessly remain upon said walk, a mass and covering of ice, which was humpy, hubbly, uneven, rough, smooth, and slippery, and which ice in said condition existed and had remained especially in front of lot 2 of said block 29, and at a point extending from about 1 foot to about 6 feet west of the east end of the board walk, which begins at the west side of the paved crossing at the westerly end of the cement walk, along and in front of and extending westerly from the mill of the Russell-Miller Milling Company, and which point was about midway in the width of the said board walk, and which said ice and snow in said condition had been negligently and carlessly permitted so to remain for a long period, to wit, for more than three days; that on the night of the 4th and the morning of the 5th of February, A. D. 1908, and prior to the time of the

accident as hereinafter set forth, there had been a fall of snow, which the defendant had negligently and carelessly permitted to remain upon and over said ice in such condition as hereinbefore set forth, which said snow added to and screened and shielded the said slippery and dangerous conditions which has been hereinbefore set forth; that of all the foregoing facts and conditions the defendant had due notice and knowledge.

"That on the evening of the said 5th day of February, A. D. 1908, between the hours of 6 o'clock and 8:30 o'clock, P. M., this plaintiff was lawfully traveling upon the said sidewalk, upon the south side of the said Kittson avenue, on foot, in a careful manner and without any negligence, when, at said point from 1 foot to 6 feet west of the east end of the board walk along the north side of block 29, of the plat of the original town of said city, which board walk begins at the west side of the paved crossing at the westerly end of the cement walk along and in front of the mill of the Russell-Miller Milling Company, and which point was about midway in the width of said board walk, owing to the defective, unsafe, dangerous, and obstructed condition of said walk as hereinbefore set forth, and the mass of ice hereinbefore described, this plaintiff slipped and fell, and was cast, thrown, and precipitated to the sidewalk and upon the ice thereon, and suffered the injuries as in the next paragraph hereof set forth."

The answer was, to all intents and purposes, a general denial, but included a plea of contributory negligence. At the opening of the trial, the defendant objected to the introduction of any evidence under the complaint on the ground and for the reason that it did not state facts sufficient to constitute a cause of action. This objection was overruled. The evidence showed that the sidewalk in question was a natural and regular method of communication between a territory consisting of about ten blocks which was south of the railway track and the business portion of the city, and that at the point in question there was no sidewalk on the other side of the street. The plaintiff, Lena Jackson, was injured while returning home between 7 and 8 o'clock on the evening of February 5, 1908. According to her testimony, when she reached the particular walk she slipped and fell. It was on the east end of the wooden sidewalk. "I had gotten onto the wooden sidewalk, and probably in there as near as I can judge from 1 to 3 feet. When I got in on the board walk I was walking along, and the first

thing I knew I was thrown off my feet. I slipped on the ice and was thrown off. I kind of slipped on one of those dumps, and it was caught against another raised dump there, and I fell in that manner that I got sitting on it; sat right on the leg. I fell towards the street. I fell with such force that I don't remember whether I heard anything particularly. I fell so I was sitting on my foot. It was twisted out like this, out this way, and I slipped on a lump, and it fell out and struck against another one so that I sat right on it. . . . The last time I had been down town was the Sunday before the accident, but on this day I was returning from down town. On this day I had also been down over this same path. Each of these three times when I went down town, while I lived at 203 Walnut street, I walked down Walnut street to Kittson avenue, on the west side. Yes, this side, we live on the east side. I walked down on the same side of the street that I lived on—and that would be the east side of Walnut—to Kittson avenue. . . . I remember that, prior to the 5th of February, 1908, on the south side of Kittson avenue, between where the railroad spur crosses Walnut and Fifth streets, there were two different kinds of sidewalk, one board and the other cement. The cement walk was from Fifth street to the alleyway. There is a little paved alleyway there. West of that was the wooden board walk, and that extended to the railroad track; then south of the railroad track on Walnut street, where the Duis property is. When I went down town these different times, I had occasion to notice the condition of the walk, the board walk between the spur there, the railroad spur and the alleyway, as to whether or not there was ice and snow on it. There was ice and snow on it, and that ice and snow had been on the board walk all winter. It had never been cleaned that I can remember. There had never been any sand or gravel or ashes or salt put on there that I can remember or that I could discover. The ice and snow that lay on the board walk was rough and uneven, kind of in humps and hollows. I should judge some of these humps would be from 2 to 3 inches, the highest, and some would be just to cover the sidewalk. Some of the ice would just cover the sidewalk. This condition that I speak of was general all over the wooden walk from the railroad track to the alleyway, between the cement and the wooden walk. I had gone down town on the afternoon of the accident, about 3 o'clock, and I had traveled over this same piece of walk. We went

to the Ladies' Aid, at Mrs. Johnson's, on the East side. Mrs. Nordland was with me. We remained over there till about between 6 and 7; then we came back and came to Mr. Nordland's tailor shop. We must have remained there until after 7 o'clock sometime. It must have been about 15 or 20 minutes past 7 when we started home. We started directly home. When we reached this board walk I slipped and fell.

. . . I traveled over this walk on my way down town on the afternoon of the 5th. I didn't just measure to see how much loose snow there was there, but there wasn't more snow than could be shifted off when I fell. There was about, maybe 5 or 6 inches of loose snow standing on the sides of the walk. That day it was snowing partly in the forenoon. It was snowing quite a good deal in the forenoon or in the morning. I remember it had been snowing the day before. I couldn't just remember whether it was blowing the day before. It was not very cold in the forenoon. I think it was colder the day before. On the forenoon of this day it wasn't just pleasant because it was snowing. I couldn't just remember whether it was falling in large flakes. I started down town about 3 o'clock in the afternoon, and went over to the Ladies' Aid Society. As I was going down town my attention was particularly attracted to this piece of walk by the ice that was there. I noticed the ice was rough as it always was. I was acquainted with this condition before. I had gone down town several times within the weeks before that. During all of that time I had found the condition of that walk to be rough. This condition was the same all over the walk. I mean from the alleyway clear back to First avenue,—to First avenue crossing the switch on the railroad track. During all of this distance the snow and ice was in that bad condition that I speak of. Along the wooden walk was always bad. That is something like—I presume something like a hundred feet. It might be only 40 or 50 feet, I couldn't just remember. I saw the condition of that walk before this loose snow went on it the Sunday before the accident. The accident happened on Wednesday. We were out for a walk the Sunday before; my husband and Mr. and Mrs. Nordland. We walked down over this piece of walk. On Sunday I noticed that it was humps and hollows and rough. I noticed it at that time as being in that condition. My attention was called to it because we always had to walk there and we always had to be careful. We always had to be careful as we walked

over that walk. When we came to the walk on this day I remember we were careful because of the ice on the walk. That Sunday it was partly covered with snow,—not on Sunday, the day of the accident. On Sunday it was partly melting and kind of soft. Sunday was a mild day, and it was partly melting and kind of soft. It was soft so that it showed after each mark of our shoe. The snow was so soft that our shoe sank down pretty nearly to the walk. On the Sunday preceding the Wednesday on which I was hurt the snow and ice was soft and slushy, and I walked down through there with these people on that day. . . . It was not so bad that day when it was so soft, not so slippery as it was when it froze upon again. . . . The water was not standing, but it was just soft. The snow went to above the heels, of the shoes. The heels of the shoes went through the soft snow, pretty close to the walk at that time. On that day I noticed this condition of softness all over the entire length of the walk. The lumps were not smoothed down much. Walking through had a tendency to make it again lumpy. Where your footsteps sank in the snow the marks remained there. It wasn't very cold Sunday evening. It was a little colder on Monday. I wasn't down town Monday nor on Tuesday. The last time that I saw the walk prior to the accident it was in a soft condition. Before that Sunday I had noticed that the walk was icy and hard and rough, so that it was necessary to take extraordinary care when you came to it. That walk was in a bad condition on the afternoon of the 5th, when I came down town. It was rough and uneven like it always was before, and a little loose snow on the top. It was not storming much when I was going down town,—kind of blowing a little. When I reached this walk I noticed it particularly that day. I did not look at it particularly, only I knew that that was the icy place and we were to be careful, and we were careful. I couldn't just say how much loose snow was on the walk at that time. There was a little path so that you walked down the center of that single file. The path that we were on was kind of slippery. The snow wasn't packed down. It was kind of loose on top of that ice, when we walked on that and slipped it would take that snow off. We would slip as often as we walked along there. It was a common thing to slip and slide around on the ice in walking on that path. It was so rough that we could not help it. We were more liable to slip because it was always icy and slippery. I

could not just say where the ice was when the snow was on top. You could not see as well where to put your feet. The path went down the center of the walk. I could not say how high the sides of it were packed on the walk. It was 4 or 5 inches. It was worse some places when it started to blow a little. There were not very high drifts. Coming back that evening, I realized when I reached the end of this plank walk. I knew that I was stepping on the plank walk when I stepped out of the alleyway. We were not talking. Mrs. Nordland was ahead going home. The first remembrance that I have of trouble—what called my attention to the trouble that was coming—I felt I slipped on the ice and fell. I was conscious of how I fell. I fell to the street. . . . The ice was in the path then I was knocked off from that. There was no ice packed down in the path to amount to anything. I didn't pay much attention that night as to what was on the bottom of the path, but I noticed after I had slipped, when I sat there. I was sitting there before we could get somebody to help me up, sitting there and kind of looking around to see and I noticed the ice. I saw the ice. I could see it plainly where I had fallen. I scraped the snow off there. I looked at it enough to see that there was ice there. I saw that there was ice there, and that was all. I felt that I slipped on one of those humps. I could feel it when I fell. When you walked along there you could feel those humps under your feet, and I felt that and was conscious of those humps before I fell. I was conscious of those humps the moment I stepped onto the walk. Those lumps that were on there were the result of people's feet cutting through on that soft, wet slush on that Sunday and freezing in that condition. There was some cold weather between Sunday and Wednesday. It was colder than it was on Sunday. It was quite mild Sunday. It was not so mild Monday night as it was Sunday, and it got gradually colder, so on Wednesday evening, when I was hurt, it had frozen quite hard. It got colder Monday. When I went down town on the evening of Wednesday, it was quite frozen. The nearest street light to the place where I fell is—well, there is a street light on the corner of Fifth and Kittson avenue, and there is another where the beginning of Walnut street is, I think. I was about center way between the two lights. On Sunday it was soft, so it was water in the hollows. No, there was no water, just flattened out. On Sunday the snow and ice was partly

humpy. During the soft weather on Sunday I think some of the hummocks had been beaten down a little bit. It turned a little colder on Monday. Sunday night, of course, was a little colder than the evening. It was cold enough to freeze, Sunday. It was not so very cold on Monday. It was cold enough to freeze a little and to stay frozen. I wasn't out on the street at all Monday. On this Sunday when I was on the walk the snow was kind of melting. There was no path in the center of the walk on Sunday. The walk was the same all over. There were quite a few people moving on Sunday; quite a few going up and down on that street that day. It was a beautiful afternoon and most everybody was out walking." This testimony was corroborated by other witnesses for the plaintiff, and denied in part by some of the witnesses for the defendant.

J. B. Wineman, for appellant.

A municipal corporation is held only to the exercise of ordinary care to make and keep its streets in reasonably safe condition. *Leonard v. Butte*, 25 Mont. 410, 65 Pac. 425; *Dill. Mun. Corp.* 5th ed. 1697; 28 Cyc. 1358.

City has reasonable time, after notice of obstructions to sidewalks, to remove same. 28 Cyc. 1378.

It must appear that sufficient time has elapsed after notice, to permit city to act, before it can be held liable. 28 Cyc. 1362; *Dill. Mun. Corp.* 5th ed. 1718.

The facts stated and relied upon must show that city is guilty of a legal wrong in failing to act with reasonable diligence. *McEnaney v. Butte*, 43 Mont. 526, 117 Pac. 894; *Corey v. Ann Arbor*, 124 Mich. 134, 82 N. W. 804; *McDonald v. Toledo*, 63 Fed. 60.

City charter and ordinances, if material as evidence in such actions, must be pleaded. *Blanchard v. Lake Shore & M. S. R. Co.* 126 Ill. 416, 9 Am. St. Rep. 630, 18 N. E. 803; *Richter v. Harper*, 95 Mich. 221, 54 N. W. 770.

Such pleading is necessary in order to give defendant (city) notice of the claim. 1 *Dill. Mun. Corp.* 83; *Gardner v. Detroit Street R. Co.* 99 Mich. 182, 58 N. W. 51, 4 Am. Neg. Cas. 163; *West Jersey R. Co. v. Paulding*, 58 N. J. L. 178, 33 Atl. 381.

A city being bound to keep its streets in a reasonably safe con-

24 N. D.—39.

dition, it cannot shift that duty by requiring the abutting owners to remove ice and snow, and upon failure to do so, create a civil liability in favor of anyone injured by the violation of such ordinance. Kan.—Jansen v. Atchison, 16 Kan. 358; Md.—Flynn v. Canton Co. 40 Md. 312, 17 Am. Rep. 603; Mass.—Kirby v. Boylston Market Asso. 14 Gray, 249, 74 Am. Dec. 682; Mo.—Norton v. St. Louis, 97 Mo. 537, 11 S. W. 242; St. Louis v. Connecticut Mut. L. Ins. Co. 107 Mo. 92, 17 S. W. 637, 28 Am. St. Rep. 402; Ohio—Vandyke v. Cincinnati, 1 Disney (Ohio) 532; R. I.—Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502.

One who voluntarily attempts to walk over a sidewalk, knowing same to be in a dangerous condition by reason of ice upon it, and which might have been avoided, cannot be regarded as exercising ordinary care and due prudence. Quincy v. Barker, 81 Ill. 300, 25 Am. Rep. 278; Chicago v. Bixby, 84 Ill. 82, 25 Am. Rep. 429; Schaffer v. Sandusky, 33 Ohio St. 246, 31 Am. Rep. 533; Evans v. Utica, 69 N. Y. 166, 25 Am. Rep. 165; Muncie v. Hay, 164 Ind. 570, 74 N. E. 250, 18 Am. Neg. Rep. 51; Evans v. Philadelphia, 205 Pa. 193, 97 Am. St. Rep. 732, 54 Atl. 775; Aurora v. Pulfer, 56 Ill. 270; Belton v. Baxter, 54 N. Y. 245, 13 Am. Rep. 578; Wilson v. Charlestown, 8 Allen, 137, 85 Am. Dec. 693.

Municipal corporation is only required to guard against such dangers in its streets, which include sidewalks, as can or ought to be anticipated or foreseen, in the exercise of reasonable prudence and care. Braats v. Fargo, 19 N. D. 538, 27 L.R.A.(N.S.) 1169, 125 N. W. 1042; Jones, Neg. Mun. Corp. Sec. 100, p. 100; 4 Dill. Mun. Corp. 5th ed. p. 2968; Dapper v. Milwaukee, 107 Wis. 88, 82 N. W. 726; Hyer v. Janesville, 101 Wis. 371, 77 N. W. 729; Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; 27 Wis. 191; Grossenbach v. Milwaukee, 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182; Chamberlain v. Oshkosh. 84 Wis. 289, 19 L.R.A. 513, 36 Am. St. Rep. 928, 54 N. W. 618; Hausmann v. Madison, 85 Wis. 187, 21 L.R.A. 263, 39 Am. St. Rep. 834, 55 N. W. 167; Beaton v. Milwaukee, 97 Wis. 416, 73 N. W. 53; Cooper v. Waterloo, 98 Wis. 424, 74 N. W. 115; Kleiner v. Madison, 104 Wis. 339, 80 N. W. 453; De Pere v. Hibbard, 104 Wis. 666, 80 N. W. 933; Harrington v. Buffalo, 121 N. Y. 147, 24 N. E. 186; McNally v. Cohoes, 127 N. Y. 350, 27 N. E. 1043; Lichenstein v.

New York, 159 N. Y. 500, 54 N. E. 67, 6 Am. Neg. Rep. 332; Salzer v. Milwaukee, 97 Wis. 471, 73 N. W. 20; Gagan v. Janesville, 106 Wis. 662, 82 N. W. 558; West v. Eau Claire, 89 Wis. 31, 61 N. W. 313; Perkins v. Fond du Lac, 34 Wis. 435.

The trial court should have granted defendant's motion for a directed verdict. McKellar v. Detroit, 57 Mich. 158, 58 Am. Rep. 357, 23 N. W. 621; Cooper v. Waterloo, 98 Wis. 424, 74 N. W. 116; Jefferson v. Sault Ste. Marie, 166 Mich. 340, 130 N. W. 610, 1 N. C. C. A. 598.

The duty resting upon municipal corporations to remove accumulations of ice and snow as it falls from time to time upon their streets is a qualified one, and becomes imperative only when dangerous formations or obstacles have been created, and sufficient notice of their existence has been received by the corporation. Hunt v. New York, 109 N. Y. 134, 16 N. E. 320; Requa v. Rochester, 45 N. Y. 136, 6 Am. Rep. 52; Taylor v. Yonkers, 105 N. Y. 209, 59 Am. Rep. 492, 11 N. E. 642; Kaveny v. Troy, 108 N. Y. 571, 15 N. E. 726; Kinney v. Troy, 108 N. Y. 567, 15 N. E. 728; Johnson v. Glens Falls, 41 N. Y. S. R. 820, 16 N. Y. Supp. 585; Winne v. Albany, 39 N. Y. S. R. 603, 15 N. Y. Supp. 423; Gram v. Greenbush, 20 N. Y. S. R. 370, 3 N. Y. Supp. 76; Kleng v. Buffalo, 72 Hun, 541, 25 N. Y. Supp. 445; Quincy v. Barker, 81 Ill. 305, 25 Am. Rep. 278; Chicago v. McDonald, 111 Ill. App. 436; Gardner v. Philadelphia, 221 Pa. 247, 70 Atl. 721; Hendrickson v. Chester City, 221 Pa. 120, 70 Atl. 553; Henkes v. Minneapolis, 42 Minn. 530, 44 N. W. 1027.

Geo. A. Bangs, for respondent.

Objection to the introduction of evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action should point out, and specify in particular, wherein the complaint is so defective. Such specification should be reproduced in the statement of the case. Rule 14, 10 N. D. XLVI, 91 N. W. VIII; Flora v. Mathwig, 19 N. D. 4, 121 N. W. 63; Larson v. Hanson, 21 N. D. 411, 131 N. W. 229.

Under such objection, the particular reason or reasons why the complaint does not state facts sufficient should be stated, so that the trial court and counsel may be informed as to the precise questions raised. The general objection is not sufficient. Chilson v. Bank of

Fairmount, 9 N. D. 96, 81 N. W. 33; *Schweinber v. Great Western Elevator Co.* 9 N. D. 113, 81 N. W. 35; *James River Nat. Bank v. Purchase*, 9 N. D. 280, 83 N. W. 7; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 384, 96 N. W. 357.

The ordinances of a city, properly passed, and within the scope of its authority, are statements, expressions, or admissions of the city, touching the subject-matter in which it is charged as having been negligent. *Providence v. Clapp*, 17 How. 161, 15 L. ed. 72; *McNerney v. Reading*, 150 Pa. 611, 25 Atl. 57; *Meyers v. Kansas City*, 108 Mo. 480, 18 S. W. 914; *Reed v. Mexico*, 101 Mo. App. 155, 76 S. W. 53; *Columbus v. Ogletree*, 102 Ga. 293, 29 S. E. 749, 4 Am. Neg. Rep. 37; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Lincoln v. Power*, 151 U. S. 436, 440, 38 L. ed. 224, 226, 14 Sup. Ct. Rep. 387; *McLeod v. Spokane*, 26 Wash. 346, 67 Pac. 74; *Levy v. Salt Lake City*, 5 Utah, 302, 16 Pac. 599; *Flater v. Fey*, 70 Mich. 644, 38 N. W. 656; *Smith v. Pella*, 86 Iowa, 238, 53 N. W. 226; *Shumway v. Burlington*, 108 Iowa, 424, 79 N. W. 123; *Herries v. Waterloo*, 114 Iowa, 374, 86 N. W. 306; *McCartney v. Washington*, 124 Iowa, 382, 100 N. W. 80.

Ordinances are admitted, in action against city, under the rule which allows proof of the acts and declarations of the parties concerning the matter in controversy. 6 *Thomp. Neg. Sec.* 7868, p. 763; *Blanchard v. Lake Shore & M. S. R. Co.* 126 Ill. 416, 9 Am. St. Rep. 630, 18 N. E. 799; *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768; *Gardner v. Detroit Street R. Co.* 99 Mich. 182, 58 N. W. 49, 4 Am. Neg. Cas. 163; *West Jersey R. Co. v. Paulding*, 58 N. J. L. 178, 33 Atl. 381.

Where a city ordinance is introduced merely as one of the circumstances, or to show declarations or admissions of city, it need not be pleaded. Ordinances are evidentiary facts,—ultimate facts is the defendant's negligence. In such cases, they need not be pleaded. *Flater v. Fey*, 70 Mich. 644, 38 N. W. 656; *Blickley v. Luce*, 148 Mich. 233, 111 N. W. 752; *Putnam v. Detroit United R. Co.* 164 Mich. 342, 129 N. W. 860.

Evidence of a statute or ordinance and its violation is admissible under a general averment of negligence. *Watson, Damages*, p. 361; *Faber v. St. Paul, M. & M. R. Co.* 29 Minn. 465, 13 N. W. 902; *Klotz v. Winona & St. P. R. Co.* 68 Minn. 341, 71 N. W. 257, 3 Am.

Neg. Rep. 201; *Meek v. Pennsylvania Co.* 38 Ohio St. 637; *McGrath v. New York C. & H. R. R. Co.* 63 N. Y. 530; *Massoth v. Delaware & H. Canal Co.* 64 N. Y. 531; *Correll v. Burlington, C. R. & M. R. Co.* 38 Iowa, 120, 18 Am. Rep. 22; *Robertson v. Wabash, St. L. & P. R. Co.* 84 Mo. 119; *Bragg v. Metropolitan Street R. Co.* 192 Mo. 331, 91 S. W. 527; *Union P. R. Co. v. Rasmussen*, 25 Neb. 810, 13 Am. St. Rep. 527, 41 N. W. 778; *Omaha Street R. Co. v. Larson*, 70 Neb. 591, 97 N. W. 824, 15 Am. Neg. Rep. 380; *Borneman v. Chicago, St. P. M. & O. R. Co.* 19 S. D. 459, 104 N. W. 211; *Interstate & G. N. R. Co. v. Lee*, — Tex. Civ. App. —, 34 S. W. 160; *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 68; *Johnson v. Thomas*, — Cal. —, 43 Pac. 578; *Harrison v. Sutter Street R. Co.* 116 Cal. 156, 47 Pac. 1019, 1 Am. Neg. Rep. 403; *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134; *Brasington v. South Bound R. Co.* 62 S. C. 325, 89 Am. St. Rep. 905, 40 S. E. 665; *Lane v. Atlantic Works*, 111 Mass. 140.

A person can only be said to be guilty of contributory negligence, when the danger is so great that no reasonable person would have pursued the same course. The verdict of the jury must not be disturbed if there is any reasonable inference or deduction to be drawn from the evidence, to sustain it. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Chicago, M. & St. P. R. Co. v. Lowell*, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; *Dunlap v. Northeastern R. Co.* 130 U. S. 652, 32 L. ed. 1059, 9 Sup. Ct. Rep. 647; *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; 3 Cyc. 348.

The appellate court will consider the evidence on behalf of respondent in its most favorable light, to sustain and support the verdict. *Illinois C. R. Co. v. Abernathey*, 106 Tenn. 722, 64 S. W. 3; *Chicago & E. I. R. Co. v. Hines*, 183 Ill. 482, 56 N. E. 177; *Nicoud v. Wagner*, 106 Wis. 67, 81 N. W. 999; *Renne v. United States Leather Co.* 107 Wis. 305, 83 N. W. 473; 3 Cyc. 353; *McCormick v. Fuller*, 56 Iowa, 43, 8 N. W. 800; *Lovejoy v. Leonard*, 51 Iowa, 695, 1 N. W. 535; *Struby-Estabrook Mercantile Co. v. Kyes*, 9 Colo. App. 190, 48 Pac. 663; *Lambert v. Sandford*, 2 Blackf. 137, 18 Am. Dec. 149; *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152; *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 31, 25 L. ed. 531, 534; *Ætna L. Ins. Co.*

v. Ward, 140 U. S. 76, 91, 35 L. ed. 371, 376, 11 Sup. Ct. Rep. 720; Lincoln v. Power, 151 U. S. 436, 438, 38 L. ed. 224, 225, 14 Sup. Ct. Rep. 387; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Muri v. White, 8 N. D. 59, 76 N. W. 503; Howland v. Ink, 8 N. D. 63, 76 N. W. 992; Cameron v. Great Northern R. Co. 8 N. D. 133, 77 N. W. 1016, 5 Am. Neg. Rep. 454; 7 Am. & Enc. Law, 2d ed. 370.

Contributory negligence, generally, possesses the elements of actionable negligence. 7 Am. & Eng. Enc. Law, 2d ed. 371; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Johnson v. Fargo, 15 N. D. 525, 108 N. W. 243, 20 Am. Neg. Rep. 460; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Wells v. Lisbon, 21 N. D. 34, 128 N. W. 308; Snee v. Clear Lake Teleph. Co. 24 S. D. 361, 123 N. W. 729; Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

The liability of a municipality for injuries caused by snow and ice on a highway is primarily based on its negligence in failing to timely remove them. Reasonable care and diligence must be exercised by city. 15 Am. & Eng. Enc. Law, 2d ed. 447; 3 Am. & Eng. Enc. Law, 2d ed. Supp. 414; 5 Am. & Eng. Enc. Law, 2d ed. Supp. 864; Bull v. Spokane, 46 Wash. 237, 13 L.R.A.(N.S.) 1105, 89 Pac. 556; Broberg v. Des Moines, 63 Iowa, 523, 50 Am. Rep. 756, 19 N. W. 340; Collins v. Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200; Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; Gillrie v. Lockport, 122 N. Y. 403, 25 N. E. 357; Hall v. Lowell, 10 Cush. 260; Rodges v. Waterloo, 109 Iowa, 444, 80 N. W. 523; Huston v. Council Bluffs, 101 Iowa, 33, 36 L.R.A. 211, 69 N. W. 1130, 1 Am. Neg. Rep. 227; Hutchins v. Boston, 97 Mass. 272; Koch v. Ashland, 88 Wis. 603, 60 N. W. 990; Luther v. Worcester, 97 Mass. 268; McAuley v. Boston, 113 Mass. 503; McKean v. Salem, 148 Mass. 109, 19 N. E. 21; Miller v. Bradford, 186 Pa. 164, 40 Atl. 409; Morse v. Boston, 109 Mass. 446; Nebraska City v. Rathbone, 20 Neb. 288, 29 N. W. 920; Norton v. St. Louis, 97 Mo. 537, 11 S. W. 242; Paulson v. Pelican, 79 Wis. 445, 48 N. W. 715; Piper v. Spokane, 22 Wash. 147, 60 Pac. 138; Providence v. Clapp, 17 How. 161, 15 L. ed. 72; Quinlan v. Kansas City, 104 Mo. App. 616, 78 S. W. 660; Reno v. St. Joseph, 169 Mo. 642, 70 S. W. 123;

Salzer v. Milwaukee, 97 Wis. 471, 73 N. W. 20; Stone v. Hubbardston, 100 Mass. 49; Storm v. Butte, 35 Mont. 385, 89 Pac. 726; Templin v. Boone, 127 Iowa, 91, 102 N. W. 789; Tobin v. Waterloo, 131 Iowa, 75, 107 N. W. 1031; Todd v. Troy, 61 N. Y. 506; West v. Eau Claire, 89 Wis. 31, 61 N. W. 313; Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621; Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

BRUCE, J. (after stating the facts as above). Counsel for defendant and appellant urges that the proof shows contributory negligence on the part of the plaintiff, as a matter of law. We cannot, and do not, so hold. He urges that "the testimony discloses that she (the plaintiff) traveled over the walk almost daily, and was aware of its condition with reference to the accumulation of snow and ice. During the afternoon she had traveled over this sidewalk and had noticed its condition, and knew that several inches of snow covered the ice beneath. She could have avoided passing over this portion of the sidewalk, as the passage on either side was free from snow and ice. The accident was not caused by striking any obstacle. She slipped on the ice and fell. It is left entirely to conjecture whether she slipped on a perfectly smooth piece of ice or on a piece of rough ice; consequently she assumed all the risks of accident when she traveled over this walk." We may assume, and perhaps the evidence justifies us in assuming, the truth of all of these statements, with the exception of the conclusion, and that "the passage-way on either side was free from snow and ice." On the latter question we think there is abundant evidence to show, or, at any rate, from which the jury might infer, that the whole sidewalk was covered with ice; that there was merely a path in the center more or less traveled and trampled down, and that the freedom from ice was on the sides, outside the sidewalk. The assumptions we have made, however, in no way support the contention of appellant. The point, in fact, has been so thoroughly passed upon by this court in previous decisions that it is no longer subject to controversy. "The question of negligence," says ex-Chief Justice Young, in the case of Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359, "whether it be of a defendant or the alleged contributory negligence of a plaintiff, is primarily and generally a question of fact for the jury. The question becomes one of law, authorizing its withdrawal from the jury only when but one conclusion can be

drawn from the undisputed facts. 'If the undisputed facts are of such a character that reasonable men might draw different conclusions or deductions therefrom, then the question of negligence must be submitted to the jury.' . . . The plaintiff was required to exercise such care as the condition of the street and her knowledge of it made reasonable under the circumstances. *A traveler is not required to forego traveling upon a sidewalk because he has knowledge that it is defective.* He has, as a general rule, a right to assume that it is safe, and when he is injured as a consequence of a defect of which he had previous knowledge, the mere fact of his previous knowledge does not, *per se*, establish contributory negligence. And this is also the rule when previous knowledge is coupled with absence of thought concerning the defect at the time of the injury, or momentary forgetfulness of it. Previous knowledge of a defect and forgetfulness of it are important facts to be considered in connection with all other circumstances, in determining whether the party injured was exercising reasonable care; but it is not negligence as a matter of law for a person who has knowledge of a defect not to remember it at all times and under all circumstances. The foregoing rules, which are founded upon reason and experience, are of general acceptance." See also *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Heckman v. Evenson*, 7 N. D. 173, 182, 73 N. W. 427, 430; *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243, 20 Am. Neg. Rep. 460; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972; *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; *Wells v. Lisbon*, 21 N. D. 34, 128 N. W. 308; *Snee v. Clear Lake Teleph. Co.* 24 S. D. 361, 123 N. W. 729; *Smith v. Yankton*, 23 S. D. 352, 121 N. W. 848; *Muri v. White*, 8 N. D. 59, 76 N. W. 503; *Cameron v. Great Northern R. Co.* 8 N. D. 124, 133, 77 N. W. 1016, 5 Am. Neg. Rep. 454. Under the rules laid down in these cases, and especially in the case of *Pyke v. Jamestown*, above quoted from, we are precluded from holding that as a matter of law the plaintiff was guilty of contributory negligence in this case. It was a question of fact for the jury, and not one of law for this court.

In passing upon this appeal we cannot be controlled by the fact that there is a conflict in the testimony. It is and must be sufficient for us that there is abundant testimony tending to support the contention of the plaintiff and respondent, if taken by itself. The rule seems to be

well established both in this and other jurisdictions, that "as a general rule, if there is any evidence which, standing alone, or considered apart from the opposing evidence, is, if believed by the jury, legally sufficient or might reasonably tend to support the verdict, though such evidence may not be of an entirely certain and satisfactory nature, it will not be disturbed; for upon the mere weight of evidence the jury are the judges, and though the evidence would not have satisfied the mind of the appellate court upon an original investigation, yet it will not sit to weigh conflicting testimony. . . . Inferences of fact are to be deduced by the jury, and whenever there is evidence from which the existence of facts sufficient to support a verdict might have been inferred, the verdict will not be disturbed." 3 Cyc. 348. In support of a verdict, indeed, the appellate court will consider the evidence on behalf of respondent in its most favorable light. All reasonable inferences and deductions are to be made in his favor. All conflicts in the testimony are resolved in favor of the respondent, and the court will take as true the strongest view of the testimony in his favor. *Illinois C. R. Co. v. Abernathy*, 106 Tenn. 722, 64 S. W. 3; *Muri v. White*, 8 N. D. 59, 76 N. W. 503; *Hovland v. Ink*, 8 N. D. 63, 76 N. W. 992; *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; *Nicoud v. Wagner*, 106 Wis. 67, 81 N. W. 999. No matter what the evidence of the defendant may be, there is no little evidence on the part of the plaintiff to show that the walk in question had not been cleaned at any time during the winter, and the snow had been permitted to collect and remained upon the walk. There had been warm days during the winter, and the snow thus permitted to gather and collect had melted, or, rather, softened, and the trampling of pedestrians had caused it to form in mounds, hummocks, hillocks, and humps, etc.; that the mounds thus formed ranged in height from an inch to 4 inches; that this condition extended all over the walk, and that though perhaps the roughness had been increased by the thaw on the Sunday previous to the accident, the walk had remained rough and dangerous for a long space of time, and that at no time was there any attempt either to remove the ice and snow or to place sand or ashes or gravel thereon, so as to render it less dangerous. So, too, there is no attempt to prove by either party that the snow which fell on Monday and Tuesday was removed from the walk. or attempted to be so re-

moved. There is also evidence on the part of the plaintiff which tends to show that the other walks in the southern portion of the city were, as a rule, in a much better condition, and that the walk in question and that in front of what is known as the Duis Warehouse, were the worst walks in the area in question.

There seems to be no little conflict on the general proposition of the liability of cities for accidents occasioned from icy sidewalks. It seems to be generally conceded that the municipality is not liable in all instances, and especially not liable for ice which suddenly is formed by sleet or rain which freezes before it can be reasonably removed, or for snow which has been packed down under the same circumstances. *Perkins v. Fond du Lac*, 34 Wis. 435; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182; *Chamberlain v. Oshkosh*, 84 Wis. 289, 19 L.R.A. 513, 36 Am. Rep. 928, 54 N. W. 618. Some courts even go further and seem to hold that a city is not liable in any event, unless there is palpable defect in the construction of the walk. The general rule, and, we believe, the better rule, however, is that the liability should be based upon negligence and upon what is reasonable under the circumstances, paying attention to the climatic conditions. What would be reasonable, for instance, in southern Illinois might not be reasonable in North Dakota or Montana, but reasonableness, and a reasonable regard for public safety, should be the criterion. The municipality under this rule is bound merely to exercise reasonable care and diligence to render the sidewalk safe. Where the sidewalk is properly constructed, the mere fact that it is rendered slippery by the presence of ice or snow will not, in itself, render it liable for resulting injuries. Where, however, snow or ice is suffered to remain for a long time until it forms into mounds or ridges, and becomes, itself, an obstruction, as it were, to the sidewalk, or on account of its depth and quantity, a mass which in every thaw may be trampled into deep ruts and ridges, which, in the night following or in a close succeeding freeze, may become dangerous and occasion for further obstruction, the municipality may be held liable. It will be held liable, if not for the accumulation, then for not using reasonable means, such as scattering sand, gravel, or ashes, to prevent the danger. If, indeed, the evidence in the case before us had not shown that the ice and snow had been allowed to accumulate at this part for a long period of time, and that

the place was much more dangerous and obstructed than the sidewalks in the locality, generally, we would have hardly felt like sustaining the verdict. The evidence, however, being such as it is, we feel restrained from interfering with it. We believe this view of the case is abundantly supported by the authorities. Even Wisconsin, which is cited by appellant in support of his proposition that mere slipperiness or hardened snow will not render a city liable, is authority for it. In *Cook v. Milwaukee*, 24 Wis. 270, 1 Am. Rep. 183, that court says: "If, however, ice or snow is suffered to remain upon a sidewalk in such uneven or rounded form that a person cannot walk over it using due care, without danger of falling down, that, it seems, does constitute a defect for which the city or town will be liable." In the case of *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20, indeed, we find a case which is very similar to the one at bar. The action was for the recovery of damages for an injury which the plaintiff received by falling upon an icy sidewalk. The evidence tended to show that "for a long time prior to plaintiff's accident, snow and ice had been suffered to remain on the sidewalk, until it had become a large accumulation at the place of the accident, where, by reason of the travel passing over it, it had become uneven, slippery, and dangerous; that on the day preceding the accident there had been a new fall of snow, accompanied by a thawing condition which melted the old snow and removed much of it; that travel over the new snow and the slush of the old made the whole uneven and full of deep tracks; that during the night previous to the accident the weather turned suddenly cold and caught this soft snow and slush in this condition and turned it into hard and glassy ice, with all this unevenness upon it; during the next morning the plaintiff, in attempting to pass over it, fell and was injured. He knew of its condition before he came upon it." There was a demurrer *ore tenus*, motion for a nonsuit, a special verdict, and motion for a new trial. The supreme court, it is true, reversed the judgment, but only because of inconsistencies in the special verdict. On the question of liability it said: "The point urged against the adequacy of the complaint is that it alleges merely an icy and unsafe condition of the sidewalk at the time of the accident, caused by a sudden change of weather. It is urged that the defendant cannot be held responsible for that condition. It is true that for a defect in a sidewalk which is mere iciness or slipperiness

produced by natural causes, the city is not responsible, yet when such condition concurs with a previous defect for which the city is responsible, the city is liable for damages. . . . The complaint alleges such previous defective condition by reason of snow and ice which had been suffered to accumulate there in an uneven, slippery, and dangerous condition. It also alleges that such condition had continued for a long time. It was not error to overrule the demurrer *ore tenus*." See also 15 Am. & Eng. Enc. Law, 2d ed. 447; Paulson v. Pelican, 79 Wis. 445, 48 N. W. 715; Collins v. Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200; Huston v. Council Bluffs, 101 Iowa, 33, 36 L.R.A. 211, 69 N. W. 1130, 1 Am. Neg. Rep. 227; Templin v. Boone, 127 Iowa, 91, 102 N. W. 789; Tobin v. Waterloo, 131 Iowa, 75, 107 N. W. 1031; Storm v. Butte, 35 Mont. 385, 89 Pac. 726.

The question is, after all, a question of public policy, which the legislature should primarily determine, and it is perhaps well to call attention to the fact that during the session of 1909 a bill was introduced in the legislature, as house bill No. 62, which sought to exempt cities from liability in such cases. The bill failed of passage. This action was, of course, subsequent to the accident in question, and is not controlling in this case. It is a fact, however, which is well worthy of notice.

There is no merit in the objection that the complaint does not allege, and the proof does not show, notice to the city. The complaint alleges "that of all the foregoing facts and conditions the defendant had due notice and knowledge;" and the evidence, at least the evidence of plaintiff's witnesses, tends to show that the ice and snow was allowed to accumulate during the whole of the winter. This would be sufficient notice under any and all of the authorities.

Objection is also made to the introduction in evidence of the charter of the city, and the ordinances of the city of Grand Forks. The provision of the charter (subdivision 14, § 47) reads as follows: "The council shall have power to regulate the use of sidewalks and all structures thereunder, and to require the owner or occupant of any premises to keep the sidewalks in front and along the same free from snow or other obstruction." Section 2770, Rev. Codes 1905, reads: "All money collected from special assessments for building or repairing sidewalks shall be kept in a fund to be called 'Sidewalk Special Assessment Fund,'

and warrants shall be drawn on such funds for the payment of the cost of building and repairing all sidewalks, and the city shall in no case be liable on any contract for the building or repairing of sidewalks for any sum whatever raised by taxation." Section 108 of the ordinances provides: "The occupant of each and every parcel of land, and the owner of each and every unoccupied lot or parcel of land, in the city, adjoining any street and along which sidewalks have been built, shall clear the sidewalks on or along such lot or piece of land of all accumulations of snow and ice, within ten hours after the same has fallen or accumulated, or by 2 o'clock in the afternoon of the following day if the same shall have fallen in the nighttime, and shall keep such sidewalks free from accumulations of snow, provided that no person shall be required to clean said sidewalks during the continuance of any snow storm on Sunday. Any person who shall violate the provisions of this section shall, upon conviction, be subject to a fine of not less than \$5 or more than \$25, and a like fine for every 8 days' continuance of such failure to observe the provisions of this section." The objection made on the trial to the introduction of these provisions of the charter was that "it was incompetent, irrelevant, and immaterial, not necessary to offer a statute in evidence;" and of the ordinances, that it was "incompetent, irrelevant, and immaterial, not binding upon the city in any action of this kind." The objection made in the brief and argument of counsel is that the charter of the city and ordinances were not pleaded, and in addition thereto, that they were incompetent and immaterial. It is quite clear that the first of these objections cannot be relied upon here, as it was not raised upon the trial. Even if it can be raised under this objection, we think there is no merit in it. Charter provisions and ordinances only need to be pleaded when a violation of them is the foundation of the action, and in none of the cases cited by counsel for appellant was the action brought against the city, but against some third person who was charged with having violated an ordinance, or against whom the ordinance was sought to be introduced in evidence. The cases he cites are *Blanchard v. Lake Shore & M. S. R. Co.* 126 Ill. 416, 9 Am. St. Rep. 630, 18 N. E. 803; *Richter v. Harper*, 95 Mich. 227, 54 N. W. 770; *Gardner v. Detroit Street R. Co.* 99 Mich. 182, 58 N. W. 51, 4 Am. Neg. Cas. 163; *West Jersey R. Co. v. Paulding*, 58 N. J. L. 178, 33 Atl. 381. These cases are not in point. In the case

at bar no right of recovery is sought under the ordinances, but the same are introduced in an action against the city merely for the purpose of showing an admission, as it were, by such city, and an assumption by it of responsibility for the ice and snow upon the sidewalks, and on the questions of contributory negligence the right of the plaintiff to rely on such assumption. In such a case such ordinances can be introduced, even without being pleaded. They are competent and relevant, not because a recovery is sought thereunder, but because, as we have before stated, they are evidence of an assumption of control by the city. It is, indeed, well established in the authorities that such assumption of control is pertinent evidence in a case. It has been held, for instance, that a city is not primarily liable for failing to light its streets, or for establishing a system of street lighting, but that if, on the other hand, it has assumed the duty of lighting, it will be expected and required to do so in a reasonably safe manner, and that the public may rely upon its reasonable performance and its reasonable continuance. See *Bloomington v. Bay*, 42 Ill. 503, 508; *Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342; *Miller v. Bradford*, 186 Pa. 164, 40 Atl. 409; *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Prather v. Spokane*, 29 Wash. 549, 59 L.R.A. 346, 92 Am. St. Rep. 923, 70 Pac. 55; *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 31; *Taake v. Seattle*, 18 Wash. 178, 51 Pac. 362; *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365. The fact that in this case the city had imposed upon the lot owners the duty of cleaning the ice from the sidewalks, and it had made it an offense not to do so, surely was pertinent evidence of an assumption by the city of that duty, or of its understanding that such duty was devolved upon it. It would be a poor argument, indeed, that a lotowner and taxpayer could be fined under the city ordinances for not cleaning the ice from his sidewalk, but that he had no right to rely upon the enforcement of such ordinances against others; or that, when it came to the question of his own individual safety, that the city had nothing to do with the safety of the thoroughfares in this respect. We think that the charter and ordinances were admissible in evidence, and that there is abundant authority in support of our holding. *Providence v. Clapp*, 17 How. 161, 15 L. ed. 72; *Lincoln v. Power*, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Levy v. Salt Lake City*, 5 Utah, 302, 16 Pac. 599;

6 Thomp. Neg. Sec. 7868, p. 763; *McNerney v. Reading*, 150 Pa. 611, 25 Atl. 57; *Putnam v. Detroit United R. Co.* 164 Mich. 342, 129 N. W. 860; *Robertson v. Wabash, St. L. & P. R. Co.* 84 Mo. 119; *Faber v. St. Paul, M. & M. R. Co.* 29 Minn. 465, 13 N. W. 902.

Such being our conclusions in the case, it follows that the instructions of the court to the jury were, to all intents and purposes, correct, and imposed no prejudice upon the defendant.

The judgments of the District Court are each affirmed.

HAWKINS v. SINCLAIR.

(140 N. W. 246.)

Opinion filed February 10, 1913. Rehearing denied March 5, 1913.

Appeal from the District Court for Stutsman County; *Coffey, J.*

Action to recover damages for the destruction of property in a fire alleged to have been started and allowed to escape through the negligence of the defendant. Verdict and judgment for the plaintiff. Defendant appeals.

Affirmed upon condition.

Knauf & Knauf, Jamestown, North Dakota, for appellant.

S. E. Ellsworth and *Carr & Kneeland*, Jamestown, North Dakota, for respondent.

PER CURIAM. The points of law raised in this case are substantially those which are raised in the case of *Seckerson v. Sinclair*, post, 625, 140 N. W. 239, and the case of *Burger v. Sinclair*, post, 624, 140 N. W. 246, and the facts are the same with the exception of those which relate to the damages sustained. The three actions, in fact, were consolidated upon the trial, and substantially the same rulings were made in each. The same error in regard to the allowance of damages was made in this case as in the others.

The plaintiff, therefore, at his option, may apply to the district court, within thirty days from the handing down of the remittitur herein, and have the judgment modified by entering a judgment for the sum of \$365.81, with costs and disbursements, and interest there-

on from the date of the verdict, but from the date of the verdict alone. Otherwise, a new trial will be granted. Each party will pay his own costs and disbursements upon this appeal.

BURGER v. SINCLAIR.

(140 N. W. 246.)

Opinion filed February 10, 1913. Rehearing denied March 5, 1913.

Appeal from the District Court of Stutsman County, *Coffey, J.*

Action to recover damages for the destruction of property in a fire alleged to have been started and allowed to escape through the negligence of the defendant. Verdict and judgment for the plaintiff. Defendant appeals.

Affirmed upon condition.

Knauf & Knauf, for appellant.

S. E. Ellsworth, and *Carr & Kneeland*, for respondent.

PER CURIAM. The points of law raised in this case are substantially those which are raised in the case of *Seckerson v. Sinclair*, post, 625, 140 N. W. 239, and the case of *Hawkins v. Sinclair*, ante, 623, 140 N. W. 246, and the facts are the same with the exception of those which relate to the damages sustained. The three actions, in fact, were consolidated upon the trial, and substantially the same rulings were made in each. The same error in regard to the allowance of damages was made in this case as in the others.

The plaintiff therefore, at his option, may apply to the district court within thirty days from the handing down of the remittitur herein, and have the judgment modified by entering a judgment for the sum of \$522.02, with costs and disbursements, and interest thereon from the date of the verdict, but from the date of the verdict alone. Otherwise a new trial will be granted. Each party will pay his own costs and disbursements upon this appeal.

SECKERSON v. SINCLAIR.

(140 N. W. 239.)

Action for damages — fire — negligence — pleading.

1. In an action to recover damages for injuries occasioned by a fire alleged in one count of the complaint to have been negligently set by the defendant, and in another to have been negligently allowed by him to spread from his land to that of the plaintiff, it is not error in the trial court to refuse to exclude evidence under the complaint on a motion made upon the trial, on the ground that the said complaint "nowhere described any land belonging to the defendant upon which it was alleged that the fire escaped or spread."

Witness — testifying to results — evidence — conclusions.

2. Where a witness gives the results of what he saw, his testimony is not objectionable on the ground that it is a conclusion rather than a statement of facts.

Evidence of value — owner of property — worth — foundation.

3. It is not error to allow the owner of farm machinery and of household furniture destroyed in a fire, to testify in answer to the question, "What was the furniture worth?" even though no foundation was laid for such testimony except the fact of ownership.

Testimony — admission of — error — damages — instructions.

4. Where plaintiff sued to recover damages for loss of farm machinery and household furniture destroyed by fire, and the court erroneously allowed testimony to be introduced as to "the difference in the value of the land for growing grass of a certain character testified to after the fire had passed over it, compared to what it was just before the fire," but in his instructions to the jury plainly and clearly told such jury not to regard any such testimony, or to allow any damages whatsoever for the injury to such grass or to the growing capacity of the land, the introduction of such testimony is deemed cured by the instruction, and not prejudicial.

Evidence — value of property — time and place.

5. It was not error to allow a carpenter and builder, who had been in the general carpentering and building business for nineteen years in a city within 20 miles of a country district, to testify as to the general value and

Note. —As to liability for setting fires which spread to property of others, see notes in 21 L.R.A. 25, and 36 L.R.A.(N.S.) 194.

As to duty of one not responsible for kindling of fire to prevent its spread from his premises, see note in 6 L.R.A.(N.S.) 882.

24 N. D.—40.

cost of building materials and labor connected therewith in relation to the construction of buildings in such district.

Evidence — hypothetical questions — foundation for.

6. The plaintiff in chief testified that the barn "was 32 by 40 feet, 10-inch ship-lap. It was a 7-foot barn, and raised up 9 feet in front, and the roof was ship-lap, and in the northeast corner I had it partitioned off for a granary about 10 feet square in the northeast corner of the barn." A hypothetical question was asked of a witness as follows: "Now, referring to the barn described by Mr. Seckerson, applying your knowledge of going prices of lumber in March, 1910, your knowledge of the cost of carpenter work and of building material generally at that time, what was the value of a barn 32 feet by 40 feet, sided with 10-inch ship-lap, ship-lap roof, with a granary 16 feet by 16 feet within it in one corner, floored?" This question was objected to on the ground that it did not refer to the building in question, nor to the time set out in the pleading. *Held*, that there was no error in permitting such question to be answered.

Hypothetical questions — basis for — variation — specific objection.

7. Where a hypothetical question is based upon testimony formerly admitted, and substantially and in general conforms to such testimony, but is objected to on the ground that in some particulars it varies therefrom, the particulars of such variation should be pointed out by the objector, and an objection that it is incompetent, irrelevant, and immaterial, or that it does not describe the building set out in the complaint, is not sufficient. Especially is this the case where the variance, if any, could have been pointed out and the error cured on cross-examination.

Instructions to jury — tort action — interest on recovery — allowance of — discretionary — objection on appeal from judgment.

8. A charge which instructs the jury that "if you find in favor of the plaintiff, then you should fix his damages at such sum as you find from the evidence he is entitled to receive as the value of the property so destroyed, and for interest on such amount," is *held* to be erroneous and improperly given, as in a tort action the allowance of interest is discretionary, and not obligatory upon the jury. Such objection may be raised on an appeal from the judgment, even though not urged on a motion for a new trial.

9. Various instructions examined, and *held* to be substantially correct.

Various proposed instructions also examined, and *held* not to have been improperly excluded.

Opinion filed February 10, 1913. Rehearing denied March 5, 1913.

Appeal from the District Court for Stutsman County, *Coffey, J.*
Action to recover damages for the destruction of property in a fire

alleged to have been set and allowed to escape through the negligence of the defendant. Verdict and judgment for the plaintiff. Defendant appeals.

Affirmed upon condition.

Knauf & Knauf, for appellant.

Where the complaint fails to state facts constituting a cause of action, advantage may be taken by objection to the admission of any evidence at the opening of trial, and where such objection on specific grounds is made, it is error to receive any evidence. *James River Nat. Bank v. Purchase*, 9 N. D. 281, 83 N. W. 7.

The rule of damages to land by fire is the difference found by the jury in the value of the land before and after the fire. *Cleveland School Dist. v. Great Northern R. Co.* 20 N. D. 124, 28 L.R.A. (N.S.) 757, 126 N. W. 995.

One must have knowledge of the prices at the place where the property is destroyed, and such knowledge must appear, in order to entitle an expert to give opinion as to values. *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197; *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977; *Jones v. Mechanics' F. Ins. Co.* 36 N. J. L. 29, 13 Am. Rep. 405.

Expert opinion evidence must be based upon full information as to the ascertained or supposed facts, and not upon recollection. *Guterman v. Liverpool*, N. Y. & P. S. S. Co. 83 N. Y. 358.

Questions seeking opinion evidence as to values or prices must conform to the date of damage or loss. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Aultman Co. v. Ferguson*, 8 S. D. 458, 66 N. W. 1081.

In tort actions the awarding of interest on amount recovered is discretionary with the jury, and the court shall so charge. Rev. Codes, § 6560; *Johnson v. Northern P. R. Co.* 1 N. D. 354, 48 N. W. 227.

The court should instruct upon every material point arising in the case. Rev. Codes, § 7021; *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1.

Carr & Kneeland and *S. E. Ellsworth*, for respondent.

Failure to comply with an order made upon plaintiff's motion to dismiss appeal, allowing certain time to defendant and appellant in which to file undertaking for costs, and conditioned that, upon his failure, the appeal should be dismissed, operates as a dismissal of the appeal.

BRUCE, J. This is an appeal from a judgment of the district court of Stutsman county for \$1,528.73 and interest thereon, from the time of the injury, in all \$1,664, for damages occasioned by a fire alleged in one account of the complaint to have been negligently set by the defendant, and in another to have been negligently allowed by him to spread from his land to that of the plaintiff.

There is no merit in appellant's first contention that the court erred in permitting the introduction of evidence under the complaint after objection made by the defendant on the trial. The reason given for the motion to exclude was that the complaint "nowhere described any land belonging to the defendant upon which it was alleged that the fire escaped or spread." Such allegation was not necessary. The basic and material fact which alone needs to be pleaded under the Code (see § 6852, Rev. Codes, 1905) was the fact that defendant negligently started a fire, or negligently allowed a fire to spread from his land, and that such fire was the proximate cause of the injuries complained of. The description of the land could, at most, be a matter of evidence. So, too, the objection made was made at the trial, and not by a motion to make more definite and certain. Even if it had merit, it was too late.

Nor did the court err in refusing to strike out the answer of the witness Seckerson to the question: "Did you follow these traces (of fire) carefully for the purpose of determining where that fire originated?" The objection was based on the assumption that the question called for a conclusion of the witness. This, however, was only the case in so far as the word "carefully" was concerned, and, if erroneous in this respect, was clearly without prejudice. It merely called, in the first place, for the simple answer of "yes" or "no." The answer, as a whole, might possibly have been objected to on the ground that the witness went further, and, in addition to answering "yes," gave the facts of his examination; but the motion to strike out was not made upon this ground, but merely upon the ground that a conclusion was called for. Nowhere, too, in the answer, did the witness give conclusions. He stated merely the naked facts. He stated what he saw. "That the southeast quarter was not entirely burned over; that there was an indication of a strawpile,—you could see where the fire had come out of the remains or ashes of the strawpile. There was more

than one of these piles, one flax and one spelts. They were both in ashes." etc. If, indeed, this answer can be taken as testimony as to conclusions rather than as to facts, there is no case where a person who testifies as to what he has seen or heard does not so testify.

Nor is there any merit in the objection to the questions propounded to and answered by the plaintiff Seckerson, as to the value of the household furniture which was admittedly destroyed. The first question was, "Do you know about what, in the aggregate, this household and kitchen furniture was worth at the time it was burned?" and was answered, "Yes, sir,—yes, very nearly. It was worth about \$250 to \$300. I had some tools and machinery burned in the fire. There was a five-horse hitch evener for a gang plow, and several other eveners and singletrees in the barn that were burned. They were worth ten to twelve dollars. The value was between ten and twelve dollars. I lost one truck wagon with a hayrack on, and one narrow-tired wagon running gear in the fire. I don't know how long it had been in use. I had bought them second-handed. The truck was worth \$22, and the narrow-tired wagon was worth about \$10." The objection made was that these questions called for a conclusion; that no foundation was laid; that they were not the proper measure of damages, and not admissible under the pleadings. In his brief counsel for appellant argues that the measure of damages for personal property destroyed is its reasonable market value in the nearest market at the time it was burned, and he urges that the question and answer should have related to the time of the burning, not to a year and three months later. We do not think the question is open to these objections. It is well established that the owner of personal property may himself testify as to its value without any other foundation being laid except as to his ownership and knowledge thereof. He need not qualify as an expert on values.

So, too, second-hand goods of the nature described can hardly be said to have a market value, and the rule as to such only requires a strict limitation as to the market values in cases where such values would be the fairest and the best measure of damages, and is ascertainable. What the law requires is certainty as far as possible, and an absence of speculation. It does not, however, require the impossible or the unreasonable. As far as the objection to the time is concerned, it is absolutely

without merit. The question was, "Do you know about what, in the aggregate, this household and kitchen furniture was worth *at the time it was burned?*" It clearly related to the time of the fire, and not to the time of the trial.

So, too, there is no merit in the contention that "the witness could not testify as to what he would take for it, what it is worth to him, or what it would have cost to replace it" (though the latter can often be shown where no proof of market value can be had). The question simply was, "What was the furniture worth?" It was not limited to the worth to the plaintiff, or to anyone else.

Exception is also taken to the allowance by the court, over the objection of the defendant, of certain testimony in regard to "the difference in the value of the land for growing grass of a certain character testified to after the fire had passed over it, compared to what it was just before the fire went over it," defendant contending that the true measure of damages in such cases is the value of the land before and after the fire. *Cleveland School Dist. v. Great Northern R. Co.* 20 N. D. 124, 28 L.R.A.(N.S.) 757, 126 N. W. 995. The admission of this testimony, however, even if erroneous, must have been without prejudice to the defendant, as the court, in its instructions to the jury, in three separate cases, emphatically instructed the jury not to pay any attention to such testimony, and that their verdict must be confined to the other articles enumerated in the complaint, all of which were buildings or personal property. We realize, of course, and defendant argues with great force, that certain errors cannot be cured by an instruction, and that there may be many cases where the courts have held that impressions made upon the minds of the jury can often not be overcome in this way. The cases cited, however, are chiefly those in which the introduction of the evidence was calculated to prejudice the jury against the defendant, and are not, as a rule, cases where a mere item of damages is testified to which the court has afterwards directed the jury to disregard. In one case, for instance (that of *Chicago v. Wright & L. Oil & Lead Mfg. Co.* 14 Ill. App. 119, 124), the testimony objected to seems to have been introduced for the purpose of inducing the jury to believe that the real defendant was a railway company, and not a city, and of arousing the possible prejudice of juries against such corporations. See also *Irvine v. Cook*, 15 Johns. 240; *Penfield v. Car-*

pender, 13 Johns. 350; Arthur v. Griswold, 55 N. Y. 400; State v. Mix, 15 Mo. 153. We do not think that any such harm could have come from the introduction of the evidence in the case at bar. In order to infer any such prejudice, we must make the assumption that juries will be purposely and wilfully disregarding of the instructions of the court, and are absolutely incompetent to measure and to figure damages. This assumption we cannot make.

Defendant also excepts to the admission of the testimony of the witness Berquist as to the value and cost of the buildings, for the reason "that the said Berquist did not live in Mt. Pleasant township, where the land was situated, and had no acquaintance therein, and nowhere showed, in his testimony, that he had any familiarity with the prices of material and labor for buildings in Mt. Pleasant township, some 20 miles from Jamestown and nearest the market of Windsor." We think there is no merit in this objection. The witness testified that he had lived, and had been engaged as a carpenter and builder for nineteen years, in Jamestown, and he is admitted to have been a man of quite extensive building experience. It is a refinement of technicality to claim that such a man was not competent to testify as to general values in a township which is only 20 miles distant from his place of residence, and from where he had been engaged in the building and carpentering business for many years.

There is, however, a more serious objection to the testimony of the witness Berquist, and one which deserves some consideration. The plaintiff Seckerson testified that "the barn was 32 ft. x 40 ft., 10-inch ship-lap. It was a 7-foot barn, and raised up 9 feet in front, and the roof was ship-lap, and in the northeast corner I had it partitioned off for a granary about 10 feet square in the northeast corner of the barn." The witness Berquist was asked the following question: "Now, referring to the barn described by Mr. Seckerson, applying your knowledge of going prices of lumber in March, 1910, your knowledge of the cost of carpenter work and of building material generally at that time, what was the value of a barn 32 ft. by 40 ft., sided with 10-inch ship-lap, ship-lap roof, with a granary 16 feet by 16 within it in one corner, floored?" This question was objected to on the ground that it did not refer to the building in question, nor to the time set out in the pleadings. It will be noted that the description in the hypothetical question

differs somewhat from the description given by Mr. Seckerson; that in it the granary was 16 by 16 feet, while in the principal question the granary was given as being about 10 feet square; and that the hypothetical question in other particulars does not exactly conform to the original description. We do not believe that the objection, however, is well taken, or that the allowance of this question and answer is a proper ground for reversal. This question was asked and answered in connection with another which is, itself, a subject of objection by appellant, and a consideration of the questions together shows the situation quite clearly. The other question was, "Now, Mr. Berquist, making use of your knowledge of the prices of material, building material, in the month of March, 1910, and of the carpenter work necessary to construct buildings such as houses, barns, sheds, outhouses, and the like, what would be the value of a wooden building 16 by 16 feet, sided with drop siding, with floor, roofed with resawed lumber with two thicknesses of tar paper between?" This building, when testified to by the plaintiff Seckerson in his examination in chief, was described as follows: "The house was 16 by 24, 14-foot posts, five rooms, shingled roof, cellar,—a frame house throughout. It was built in 1905. The barn was built that spring, and later on, the next fall, put the addition on. That would be in 1906." It will be noticed that, as in the latter case, there is a difference between the testimony in chief and the hypothetical question. The hypothetical question did not include the cellar, did not state that the house was a frame house throughout, or that it was built in 1905. It, however, stated that it was "double-sided, tar paper between the siding, floor throughout." The objection made to the question, however, was merely that it was not confined to the pleadings, did not refer to the building in question, or to the time set out in the pleadings, and as not tending to prove the issues under the pleadings in the case. On a similar objection being made in regard to another building, and a few moments before, the following colloquy took place:

The Court: Unless it should appear in evidence that that is the size of the house in question, in my opinion it would be incompetent.

Mr. Ellsworth: The pleadings show a building of that dimensions; the evidence shows it. Mr. Carr says it is not in the pleadings; it is in the evidence.

The Court: If it is in the evidence, it has escaped my recollection.

Mr. Ellsworth: We would ask, then, that the evidence of Mr. Burger be looked up in that matter. Question repeated.

Mr. Knauf: Objected to also for the reason it does not refer to the building in question, nor to the time set out in the pleading.

The Court: The objection is overruled.

Mr. Knauf: Exception.

It can thus be seen that there was a doubt in the minds of the court and of counsel as to the exact testimony in regard to these matters, and it would seem to be only a fair rule of practice that when an objection is made to a hypothetical question merely on the ground of some variation from the facts as before testified to, that the particulars in which the variation consists should be pointed out. Unless such rule is adopted, however, a hypothetical question can rarely be asked with any degree of safety, and such seems to be, if not the universal, at any rate the general and a proper, rule. It is certainly not too much to require of an objector that he should know the reason why he objects, and that, if he knows the reason, that he should enlighten the court upon the subject. See *Prosser v. Montana C. R. Co.* 17 Mont. 372, 30 L.R.A. 814, 817, 43 Pac. 81; *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907, 65 N. W. 1043; *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490; *Howland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983; *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *People v. Willson*, 109 N. Y. 345, 16 N. E. 540; *State v. Reddick*, 7 Kan. 143; 8 Enc. Pl. & Pr. 163.

Objection was also made to the hypothetical question in regard to the coal shed. The witness Seckerson testified in his examination in chief that "the coal shed was 8 by 10, or 10 by 12. I don't just remember how big it was, and the closet 4 by 6, all constructed from wood with shingle roof and floor, and was built in the spring of 1905." The hypothetical question was as follows: "What would be the value at that time of a combined wood shed and water-closet, the coal shed 10 by 12, 6 feet high, the water-closet 4 by 6, made from 10-inch ship-lap, boarded rough?" The answer was \$35. To this question the defendant objected for the reason that it was incompetent, irrelevant, and immaterial, no foundation having been laid for the testimony, not properly

admissible under the pleadings, and not tending to prove the issues in the case. It will be noted that the height of 6 feet was given in the hypothetical question, while no height was given in the question in chief. The water-closet was given in the question in chief as being constructed of wood, while the hypothetical question gave it as made from 10-inch ship-lap, boarded rough. The same consideration would seem to apply to this hypothetical question as to the others before mentioned. The description in the hypothetical question and in the main question was so similar that the differences, if any, could easily have been pointed out. So, too, defects in the questions could easily have been pointed out and corrected on cross-examination. 5 Enc. Ev. 612; *People v. Borgetto*, 99 Mich. 336, 58 N. W. 328; *Hall v. Rankin*, 87 Iowa, 261, 54 N. W. 217; *State v. Ginger*, 80 Iowa, 574, 46 N. W. 657; *Meeker v. Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773.

The objection that the testimony in regard to the values does not relate to the time of the fire is not borne out by the facts. Practically all of the questions specifically refer to such a time, and the defendant was in no way prejudiced.

Exception 6 is taken to the instructions of the court "that if this defendant set, or caused to be set, fire to the said stack of flax straw in the midst of a stubble field, such act was, in the eyes of the law, the act of setting fire to the stubble in the fields." It is argued that this instruction "infers that any setting of fire to the straw pile was setting it to the stubble, while part of the theory of the defense was that the fire which finally traveled to or reached the plaintiffs' premises was set on section 12 or section 6, and not on section 11." It is well established that, provided there is proof that the fire spreads to the stubble, such an instruction is not erroneous, and that it would be the refinement of technicality to claim that setting fire to a straw pile which in turn sets fire to stubble is not setting fire to the stubble itself. *Kelley v. Anderson*, 15 S. D. 107, 87 N. W. 579. When we consider the instruction as a whole, we are quite certain that the jury was not misled. A little later in the instruction the court charged that "the first important question for the jury to decide is whether the fire in the flax straw stack upon the defendant's land was the proximate cause of the conflagration which swept over and destroyed the property of

plaintiffs. It is a question of fact for you to determine from the evidence whether or not the fire from the flax straw stack spread therefrom to the stubble field and from there to the grass on the prairies and thence to the property of the plaintiffs." This paragraph of the charge made it clear to the jury that they must find that the fire from the stack spread to the stubble and to the premises of the plaintiff. There is clearly no merit in the objection of the appellant.

Nor is there any merit in his "point 9," that the court erred in not instructing the jury, at the request of the defendant, that "if the fire which burned the property of the plaintiffs originated on section 6, township 138, range '66, the plaintiffs cannot recover, even though the said fire from said section 6 may have joined the fire which was on section 12 in township 138, range 66. In other words, if the fire which burned plaintiffs' property originated on section 6 in the same township, then the plaintiffs cannot recover, and your verdict must be for the defendant. The jury is instructed that the burden of proof in these cases is upon the plaintiffs to show that the fire which burned their property—the property in question or the property of either of them—was set by the defendant to the stubble, and negligently permitted it to escape from his stubble field to the prairie, and thence to, over, and upon the land of the plaintiffs, or any of them, and destroyed the alleged property; you must find first, by a preponderance of the evidence, that the defendant set the fire in question, or, second, that he caused it to be set, and unless you so find, then the plaintiffs cannot recover, and neither of them can recover; and if you fail to find that the defendant set the fire, or caused it to be set, then you must find for the defendant, or, if you fail to find that the fire escaped from the defendant's land on said section 11, then you must find for the defendant, and the plaintiffs cannot recover. The burden of proof is upon the plaintiffs to prove, by a fair preponderance of the evidence, the allegations of their complaint, and if they fail so to do, then you must find for the defendant." The court, in its general charge, fully covered the latter part of this proposed instruction, and fully charged the jury that they must be satisfied from the evidence that the fire which destroyed the premises of the plaintiffs originated on the land of the defendant and extended to the property of the plaintiffs. Beyond this the court was not required to go. The first portion of the proposed instruction, in-

deed, does not state the law, and the refusal to give it was therefore not error. It absolutely ignores the legal fact that when the wrong of two persons jointly contributes to the injury, both of such persons are liable. The portion of it which instructed the jury that plaintiff could not recover "if the fire which burned the property of the plaintiff originated on section 6, township 138, range 66, *even though* said fire from said section 6 may have joined the fire which was on section 12," is, itself, clearly erroneous. The proposed instruction was also erroneous in that in it the court was requested to instruct the jury that the plaintiffs could not recover "unless the jury found that the fire was set by the defendant to the stubble and negligently permitted to escape from the stubble to the prairie, and thence to and over and upon the lands of the plaintiffs, or any of them, and that it destroyed the alleged property." This proposed instruction told the jury that if the defendant set the fire, he was not liable unless he negligently permitted it to escape. This is not the law. Setting fire to prairie land in the month of March renders the one who does so absolutely liable. It is not even necessary, indeed, that it should have been done with any negligence or malicious purpose. Section 2061, Rev. Codes 1905; 19 Cyc. 981; *Thoburn v. Campbell*, 80 Iowa, 338, 45 N. W. 759; *Conn v. May*, 36 Iowa, 241; *Dunleavy v. Stockwell*, 45 Ill. App. 230. We know that counsel contends that § 2061 does not specify straw stacks, but it does specify grass or stubble lands. To say that setting fire to a straw stack which is in the midst of stubble, and, in turn, sets fire thereto, is not setting fire to the stubble itself, is an absurdity. *Kelley v. Anderson*, 15 S. D. 107, 87 N. W. 579. The proposed instruction, too, failed wholly to take into consideration any liability on the part of the defendant for failure to take ordinary care to prevent the spread of the fire, even if he did not set it in the first instance. In the case of *Baird v. Chambers*, 15 N. D. 618, 6 L.R.A.(N.S.) 882, 125 Am. St. Rep. 620, 109 N. W. 61, we said: "After he [defendant] discovered the fire on his premises, he was bound to exercise reasonable care and diligence to prevent it from spreading so as to endanger his neighbor's property. His duty in this respect, after discovering the fire, would be the same as that resting upon a person who, without negligence, starts a fire on his own premises. He was bound to put forth such reasonable effort to prevent the fire endangering his neighbors, as a man of ordi-

nary prudence would put forth who was actuated by a proper regard for his neighbors' rights and safety."

Counsel also excepts to the refusal of the court to instruct the jury "that the real question of law involved in this action, upon which all other issues depend, is that of the liability of the defendant for the acts of others, if the testimony shows that he did not set the fire. The fact that fire is set by someone and negligently permitted to escape and spread by others, until it destroyed the plaintiff's property, presents no ground at law for holding the defendant liable. To make him liable he must have set the fire or caused it to be set, and in this action the testimony of the defendant and his witnesses was that he did neither, and if you believe their testimony you must find for the defendant. In order to hold defendant liable for the damages in these cases, it must appear by a fair preponderance of the evidence that he either set or authorized the setting of the fire which burned the plaintiffs' property and caused their losses." There was no error in refusing to give this instruction. That part of it which was material and proper was fully covered by the instructions of the court. The instructions, too, as presented by counsel, were erroneous in many particulars. It perhaps called undue attention to the testimony of the defendant, and sought to give judicial sanction thereto. It was certainly open to the objections which we have given to the instruction asked and treated under the head of exception 9.

Objection is also made to the admission of the testimony of the witness Hawkins as to the reason for not investigating the origin of the fire sooner than he did. The objection urged that the reason was immaterial, and tended to prejudice the jury, the testimony being to the effect that the witness was tired out on account of fighting the fire for over a day, etc. The answer to this question was hardly immaterial. It tended to show the general good faith on the part of the witness, and we do not believe could have worked any prejudice. The narrative record which we have before us seems to give support to the arguments of counsel for respondent that the question was brought out by the examination of the appellant himself, and was in answer to the indirect reflection upon the witness contained in a question by appellant's counsel to the witness Sinclair, when he said, "Four or five days after the fire was the first time?" though, of course, the significance of this

question would depend entirely upon the inflection of the voice, which we have no means of gathering from the printed record. We cannot say from the record, therefore, that the question or the answer was improper.

We can see no merit in appellant's "point 3," that the court erred in refusing permission to certain witnesses to testify that no burnt strip existed through the stubble between the straw bottom and the prairie immediately east. The record shows that they abundantly covered the question in the testimony that was admitted, and the questions objections objected to would merely have been cumulative.

Much less merit is there in "point No. 4." The question may have called for hearsay evidence, and may not have been limited as to time, but as it was answered "no," no harm could possibly have been done.

Neither is there any merit in "point 5" as to the testimony in rebuttal of the witness Gilbert and Rankenin. Objection is made that this testimony was not proper rebuttal testimony, and that the time was not specified. We are perfectly satisfied that no material error was committed in relation thereto.

Objection is also made, in "point 7," to a portion of the charge in which the court said: "On the other hand, the defendant has produced a number of witnesses who have in some instances squarely contradicted the evidence produced by the plaintiffs. This conflict of evidence it is your duty to harmonize in the light of the evidence and circumstances in the case. The fact that one witness squarely contradicts another on a certain point does not necessarily nullify the evidence upon that point, but the means of knowing the facts testified to by certain witnesses could be such as to convince you that such witness is telling the truth, while the other has testified falsely." The objection is that if the evidence was squarely contradicted it would be impossible to harmonize it. There is technical merit in this objection, but none which is worthy of any consideration. We are quite sure that the jury knew what the court meant. We prefer to adopt the latter conclusion.

We now come to appellant's "point 8," which was to the effect that the court erred in instructing the jury that "if you find in favor of the plaintiff Burger, then you should fix his damages at such sum as you find from the evidence he is entitled to receive as the value of the property so destroyed, and for interest on such amount as you find from

March 23, 1910, at 7 per cent per annum; and if you find for the plaintiffs Seckerson and Hawkins, then your verdict should be found in the same manner. But if you find that the plaintiffs are not entitled to recover, then your verdict should be for the defendant." This instruction was erroneous. The statutes and decisions of this state all hold that in tort actions the awarding of interest shall be *discretionary* with the jury, and not mandatory upon them. Section 6560, Rev. Codes 1905; Johnson v. Northern P. R. Co. 1 N. D. 354, 48 N. W. 227.

Appellant contends, we know, that the point should have been specifically pointed out on a motion for a new trial in the court below. This, however, we do not deem to be the law, and, though it would have been well to have done so, it was not necessary in order to save the point. See Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276.

The plaintiff, therefore, at his option, may apply to the district court within thirty days from the handing down of the remittitur herein, and have the judgment modified by entering a judgment for the sum of \$1,528.73, with costs and disbursements, and interest thereon from the date of the verdict, but from the date of the verdict alone; otherwise, a new trial will be granted. Each party will pay his own costs and disbursements upon this appeal.

PARSONS, by T. J. Parsons, Guardian, *ad Litem*, v. LEE et al.

(140 N. W. 712.)

Plaintiff executed a deed for a quarter section of land, and seeks to have it set aside on the ground of mental incompetency.

Conveyance — deed — mental incompetency — cancelation — pleading — evidence.

(1) Evidence examined and *held* that the plaintiff was of unsound mind at the time of the execution of the deed. Further *held* that the allegations of the complaint to the effect that plaintiff was afflicted with fits or periods of mental incompetency, and that the plaintiff was mentally incompetent at the

Note.—As to validity of deed by incompetent generally, see note in 19 L.R.A. 489.

As to whether deed of real property executed by an incompetent not judicially declared such may be avoided in an action at law, see note in 19 L.R.A.(N.S.) 461.

time of the execution of the deed, are properly supported by evidence that the plaintiff was an epileptic and feeble minded all his life.

Pleading — grantee — consideration — return of — condition to cancelation.

(2) Evidence examined and *held* that the plaintiff received the sum of \$350 in cash at the time of the execution of the deed. In the absence of an allegation in the complaint that the grantee acted with a fraudulent intent, it is held that plaintiff should be required to return said sum as a condition to the cancelation of the deed.

Opinion filed March 11, 1913.

Appeal from the District Court for Ward County, *Goss, J.*
Modified and affirmed.

Greenleaf, Bradford, & Nash and *Geo. A. McGee*, for appellants.

The evidence offered to prove permanent mental incompetency was not admissible under the pleadings, and cannot sustain the judgment. *Garland v. Davis*, 4 How. 131, 11 L. ed. 907.

The rule is that evidence not authorized by the allegations cannot be juridically considered; there need be neither objection nor exception to it. *Nelson v. Thompson*, 16 N. D. 295, 112 N. W. 1061.

The test of the competency of a person to do an act is that he should be qualified to do that particular business rationally. *Carnegie v. Diven*, 31 Or. 366, 49 Pac. 891.

Capacity to convey real property must be equivalent to ability to devise the same. *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6; *Elwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 740; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603.

To render a judgment within the jurisdiction of the court, among other things, it must appear that the matter acted upon was before the court under proper pleading. *Camp v. First Nat. Bank*, 44 Ala. 497, 103 Am. St. Rep. 173, 33 So. 241.

Plaintiff is confined to a recovery upon the cause of action declared upon. *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 369, 16 S. W. 595; *Swing v. St. Louis Refrigerator & W. G. Co.* 78 Ark. 246, 115 Am. St. Rep. 41, 93 S. W. 978; *Sache v. Wallace*, 101 Minn. 169, 11 L.R.A. (N.S.) 803, 118 Am. St. Rep. 612, 112 N. W. 386, 11 Ann. Cas. 348; *Slacum v. Pomery*, 6 Cranch, 221-223, 3 L. ed. 205-206.

A fault in the declaration, which ought to have prevented judgment

in the lower court, may be first assigned as error on appeal. *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Bartlett v. Crozier*, 17 Johns. 439, 8 Am. Dec. 439; *State ex rel. Ward v. Muench*, 217 Mo. 124, 129 Am. St. Rep. 536, 117 S. W. 25; Rev. Codes, 1905, Secs. 4018, 4019; Rev. Codes, 1905, § 5380.

The mental incompetency must be established as of the time of the transaction. *Wright v. Jackson*, 59 Wis. 569, 18 N. W. 486; 4 Ann. Cas. 493, note; *Nelson v. Thompson*, 16 N. D. 295, 112 N. W. 1060; *Elwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 740; *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6; *Carnegie v. Diven*, 31 Or. 366, 49 Pac. 891.

Palda, Aaker, & Greene, for respondent.

It is not proper for appellants to claim for the first time, in this court, that the proofs do not conform to the pleadings. The plaintiff's deed was void. Rev. Codes 1905, § 4018; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Burnham v. Mitchell*, 34 Wis. 138; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *Hull v. Louth*, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270; *Gates v. Carpenter*, 43 Iowa, 152; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; 1 Am. Lead. Cas. 259; 22 Cyc. 1176, note 1.

BURKE, J. This is an action brought by the plaintiff through his guardian *ad litem* to set aside as void a deed to 160 acres of land in McHenry county given by plaintiff to one of the defendants. The plaintiff, his father, and his brother, and the defendants Oscar Lee and Orna Lee, all had government homesteads in the same neighborhood. In May, 1903, plaintiff proved up upon his land, and a few days thereafter executed a warranty deed to Hulda Lee, wife of Oscar Lee. The complaint alleges, among other things, "that the plaintiff herein is afflicted with fits or periods of mental incompetency, at which times the said plaintiff is incompetent to transact business, or to know or realize what the plaintiff herein is doing. That on or about the 16th day of June, 1903, this plaintiff, while mentally incompetent and without knowing what he did, or what was being done by him, the said plaintiff, executed an instrument in writing which plaintiff now learns purported to be a warranty deed signed by this plaintiff . . . and reciting a consideration therein of \$900. That plaintiff further states the fact

to be that he has no knowledge of having executed any such instrument, and that in fact he never received from Hulda Lee, the grantee named in such purported deed, any money or consideration whatever, and that said deed is wholly void, and was procured by fraud, and was signed, if signed at all, by this plaintiff when said plaintiff was mentally incompetent and wholly unable to judge of the nature of the act which was then performed; that this plaintiff never had at any time any intent to transfer said land in accordance with said purported warranty deed."

(1) The evidence offered at the trial was to the effect that plaintiff was subject to fits from childhood, and that he was not temporarily mentally incompetent, but permanently so, having been in this condition all his life. Many of the witnesses have known plaintiff from his early boyhood. We will give extracts only of the testimony of a few of those witnesses which is fairly typical of all of the testimony upon that point. One witness says, "He was paralyzed upon one side, one hand, one foot, and he held his hand up to one side close to his body, and one foot kind of dragged, and his face was drawn to one side." Another witness says, "I went to school with him and he never made any advancement in his studies. He didn't talk any intelligent talk with the boys. One reason that I knew he wasn't smart,—he would run away nights and hide in the woods, and the family would have to go out and hunt him. . . . We went to class in the fourth reader; he could hardly read in the first reader; he wasn't fit for the fourth reader." Another witness says, "He would go out in the road and stand around sometimes, maybe for half an hour, and walk off again. I have known of him going away from home at night and his father coming after me to go and hunt for him. We took lanterns and hunted until about 12 o'clock at night, and we gave him up to freeze,—it was down about zero. We quit then and he told us next morning that he had followed us around, and laughed about it." Another witness says, "He was a boy that didn't talk much. About all he would say would be 'yes' and 'no' when you would talk with him. I never heard him in conversation with others. . . . He came to my house one night after I had gone to bed. I heard a noise on the porch quite a bit. He didn't knock at the door. I got up and opened the door and Wade Parsons was standing on the porch. He was pretty cold. It was a cold

night. I asked him in, he came in, and I put him to bed. . . . He got up the next morning, but disappeared without saying anything about where he was going." His brother testified that "his mind resembles something like that of a child. His ideas resembled that of a child." This brother also testifies that his mind had been weak all his life, and was getting worse of late years. The plaintiff's father testifies that Wade was subject to fits; he says, "He takes spells and falls just like a man shot. He was liable to fall at any time." All of the plaintiff's witnesses state positively that in their opinion plaintiff was totally unable to understand the nature of or transact any business whatever. The plaintiff himself was called as a witness and gave testimony covering many pages of the printed abstract. This testimony is too long to be set forth in this opinion, but we have reached the conclusion, after a thorough examination, that the plaintiff was very weak mentally, and that he was in no condition at any time in his life to transact business of the importance of this sale. He is made to say many contradictory things, and evidently was much confused. Upon the whole testimony we are inclined to believe with the finding of the trial court that he "was of unsound mind," and "his mental condition was such that he was incapable of understanding the significance of contracts or any other ordinary transactions of business, and not of sufficient understanding to make him capable of executing contracts of any kind." The appellants insist that all of the above enumerated testimony was improperly received under the pleadings, and point to the fact that the complaint alleges that the plaintiff was afflicted with fits or periods of mental incompetency. We do not think there is anything in this point. The complaint also alleges that the deed was given while the plaintiff was mentally incompetent and without knowing what he did, and the one allegation is as important as the other. At all events the proof is broader than the allegation of the complaint, according to appellants' construction. The pertinent fact proven was that, at the time of the execution of the deed, plaintiff was clearly incompetent to execute the same. Whether this incompetency was temporary or permanent does not appear to us to be vital, excepting as it may affect the question of the return of the \$350 hereinafter mentioned, and as to this we have decided that it be returned to defendants anyhow.

(2) The above announced conclusion renders the deed invalid, and

the only question remaining is whether or not the defendants paid him any money, and if so, whether or not such money must be returned. The three defendants testify, and they are corroborated by one disinterested witness, that plaintiff came to the house of Oscar Lee and offered to sell him the farm for \$1,000, saying that he had quarreled with his father and wished to go to Canada to his brother. They testify that the sale was made finally for \$900, \$350 of which was to be cash and \$550 was to be represented by the defendants assuming a mortgage of that amount upon the premises. The three defendants testify that they were present when Mrs. Lee counted out the cash and paid to plaintiff \$350. This testimony is corroborated by that of the witness Maple, who was a hired man, and who testifies that he took particular notice of the amount of the money and counted it while Mrs. Lee was counting it, and knows that there was \$350, and that the plaintiff rolled it up and put it into his pocket. There is no testimony to the contrary, and the plaintiff, when on the stand, both denied and admitted receiving such amount. The testimony of the witness Maple is particularly convincing, as his testimony was given by deposition, and he seemed to be entirely removed from any influence of the Lees. We are therefore unable to agree with the trial court in its finding that no consideration was paid. It being our conclusion then that the plaintiff received \$350 in cash on the 16th of June, 1903, the next question arises as to whether this amount should be repaid before the deed is ordered canceled. The trial court held that the defendants, and each of them, knew of the mental condition of plaintiff, and that their actions in dealing with him amounted to a fraud, and that they were not entitled in equity to have any sum paid to them, if they had in fact parted with anything. The finding is amply supported in the evidence, and we would probably not disturb the same had it been pleaded; but the complaint nowhere alleges that the defendants were aware of plaintiff's condition, or that they were guilty of any fraud. In view of these facts, and the further fact that plaintiff has not asked an amendment of his complaint in this particular, we will order that this money be returned to defendants with 7 per cent interest since June 16, 1903. The trial court will modify its judgment in this particular, and enter a judgment that the plaintiff shall pay such sum to the defendants within ninety days after notice of final entry of judgment, and thereupon

the court will enter a decree canceling said deed. If the said sum is not paid within such time, the action will be dismissed. The mortgage upon the land, which is owned by the defendant Oscar Loe, has not been attacked, and will stand.

Our conclusion herein shall in no manner be held to prejudice any right which plaintiff may have to require from defendant an accounting for the rents and profits of the land since the year A. D. 1903, in an independent action.

Goss, J., being disqualified, took no part in this decision.

**McADAM v. GRAND FORKS MERCANTILE COMPANY, a
Corporation.**

(47 L.R.A.(N.S.) 246, 140 N. W. 725.)

Complaint — indorser — promissory notes — vendor — warrantor — chattels.

1. Complaint examined and held not to state a cause of action against the defendant as an indorser of a note, but as a vendor and warrantor of a chattel merely.

Negotiable instrument — in due course.

2. A executed a note to B. B indorsed the same without recourse to C, a bank, to gain credit thereon. He afterwards paid C the amount due on said note, and, on it being redelivered to him, scratched out the words, "Pay to C without recourse," but left his signature thereon. Prior to such time A, the maker of the note, had failed, and a settlement had been made with his creditors by which they had agreed that A's property should be turned over to a trustee for their benefit and that he should be released. B was one of such creditors, and accepted a final dividend of 42 cents on the dollar. He, however, retained the note. Later B sold the note with others, having a face value of \$20,000, to D for \$51, taking at the same time a collateral agreement by which he expressly exempted himself from all liability, both as an indorser and as a guarantor of the solvency of the paper. The note, however, still had his name indorsed thereon, though it is not shown whether either he or D was aware of the fact. D then sold the note, with others, having a face value of \$5,000, to E; and E sold the said note, with others of a face value of \$1,600, to F, for \$50, both of the latter transfers being by delivery only. At the time of the last transfer E told F that the notes were not

worth anything; and F did not know that B's name was on the back of the particular note in question; nor, on the other hand, did he know that any dividend had been paid thereon, though he did know that the maker's assets had been turned over to a trustee for the benefit of his creditors. He also testified that the letters P and L were on said note when purchased by him, and that he was aware of their commercial meaning. It was also proved that both D and F realized, from their purchases as a whole, more than they had paid therefor. *Held*, that F was not a purchaser in due course of negotiable paper.

Notes — demand — reasonable time.

3. A note payable on demand is due within a reasonable time after its date.

Demand note — date — time when overdue.

4. A note which is payable on demand, and is purchased over a year after its date, will be considered to have been overdue when so purchased.

Negotiable instrument — indorsement — dishonor — maturity — consideration.

5. In the case of an indorsement or transfer of a negotiable instrument after its dishonor or maturity, and where the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee in an action against the indorser can recover only the consideration he has actually paid.

Warranty — indorser — vendee.

6. The warranty of the seller, under § 5428, Rev. Codes, 1905, which provides that "one who sells or agrees to sell an instrument purporting to bind anyone to the performance of an act thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all parties thereto, and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, when that is material, the extinction of its obligations or its invalidity for any cause" is not a warranty of an indorser, but a warranty to the vendee merely, which does not run with the paper.

Opinion filed March 15, 1913.

Appeal from a judgment of the District Court for Grand Forks County; *Templeton, J.*

Affirmed.

On June 14, 1904, W. Crawford & Son executed and delivered to the defendant, Grand Forks Mercantile Company, their promissory

note for \$600, payable on demand, said note being given in part payment of an open account for goods sold and delivered. On June 21, 1904, the note was indorsed by the defendant, "Demand, notice of non-payment, and protest waived. (Signed) Grand Forks Mercantile Company, by W. A. Curry," and delivered to the First National Bank of Grand Forks, which bank thereupon gave to the defendant credit upon its books for the amount of said note. Afterwards, and on the 5th day of February, 1904, by a written agreement made with a large number of their creditors, including the defendant Mercantile Company, the said W. Crawford & Son conveyed to one E. A. Young all of their partnership assets in trust for the benefit of such creditors, with power of sale in such trustee, said trust agreement containing the provision that "if there shall not be sufficient assets to pay the just debts of the respective creditors, then the parties of the first part, William Crawford and William H. Crawford, shall be forever dismissed, discharged, and freed from further liability on their respective accounts." In said agreement each of said creditors also expressly agreed to "forego all suits, actions, or proceedings of any kind whatever for the collection or enforcing of our several demands, and to accept payment thereof as in the annexed trust deed provided." On October 14, 1904, the defendant mercantile company paid to the First National Bank the principal and interest of said note, and the same was then and there redelivered to it. Thereafter, and on November 1, 1904, the trustee paid to such mercantile company 42 per cent of its claim, such claim having been theretofore duly filed with the trustee. No other and further payment thereon was ever made by such partnership or trustee. Thereafter, and on the 2d day of March, 1905, the said mercantile company sold the note in question, together with others amounting in all to a face value of \$20,000, to one S. S. Titus for \$51. Before such transfer, however, it had erased from said note the words "demand, notice of nonpayment, and protest waived;" but, on the other hand, such agreement of sale was in writing, dated contemporaneously with the delivery of the note, and contained the provision that "the consideration of the above bills receivable and the securities thereto attached is to be the sum of \$51, which is paid with the understanding that the seller does not guarantee the solvency of any note or security in the said list, and is not to be held as an indorser on any of the said notes or securities." There-

after, and on March 6, 1905, the said S. S. Titus sold the said note with others whose face value in all aggregated \$5,000, to one John Vallely, for the sum of \$50, all of said notes being at such time upon their faces apparently overdue. After the purchase of said note, and on the same date, the said Vallely met the plaintiff, A. E. McAdam, tossed several of the notes so purchased, and aggregating a face value of between sixteen and seventeen hundred dollars, and including the note in suit, on a desk in front of the plaintiff, and asked the plaintiff what the bunch of notes so tossed down in front of him was worth. The plaintiff answered that they were not "worth a damn." The said Vallely then said: "You surely can get something out of them." Plaintiff then said: "Are they your notes?" Vallely replied, "They are, what will you give me for them?" Plaintiff answered: "Fifty dollars." The offer was then and there accepted, and the said plaintiff, McAdam, thereupon paid the said Vallely the sum of \$50, and all of said notes were delivered to the plaintiff. At the time of the purchase of said notes, the plaintiff did not know that the note described in the plaintiff's complaint and herein sued upon bore the indorsement of the defendant. Before such purchase, however, he knew that the assets of said Crawford & Son, the makers of said note, had been turned over to the trustee for the benefit of their creditors; that the plaintiff purchased the said notes, including the note in suit, for the purpose of speculating on the chance of their collection from the makers thereof. All of the notes so purchased appeared upon their faces to be overdue, although the plaintiff had no knowledge of the payment of any amount of the note sued upon, but believed that, in the settlement of the trusteeship, a substantial dividend would be realized. Plaintiff realized, out of the other notes purchased by him from said Vallely, more than the sum paid for all of said notes; and at the time of the purchase of said note he saw, upon the face and margin thereof, the letters and characters "P. & L.," and knew that said letters and characters meant, in mercantile usage, "profit and loss." Immediately on the purchase of said notes plaintiff instituted inquiries which revealed the facts set forth in the trustee agreement aforesaid; and on March 31, 1905, one of the makers, W. H. Crawford, wrote to him, informing him of such trust deed, and that he and his partner had turned over all of their property under such deed, and that said trust agreement had been signed by the Mercantile Company. On March 8,

1905, the trustee also wrote him, evidently in response to a letter, that a dividend of 42 per cent had been paid to the mercantile company, and that this closed the transaction in so far as the trustee was concerned. After the receipt of this last letter, plaintiff demanded payment of said note from the makers, W. H. Crawford & Son, and payment thereof was refused. Immediately thereafter, payment was demanded from and refused by the defendant. There is no evidence, however, showing or tending to show that the said note was ever presented for payment, or that notice of the dishonor of said note by the makers was ever given to the defendant. The complaint, after omitting the formal parts, was as follows: "That on the 16th day of January, 1904, said W. Crawford & Son, by W. H. Crawford, made, executed, and delivered their certain promissory note in writing, wherein and whereby, for value received, they promised and agreed to pay to the Grand Forks Mercantile Company, on demand, at the office of said company, at Grand Forks, North Dakota, the sum of \$600, with interest thereon from date at the rate of 10 per cent per annum until paid. That thereafter the said defendants sold and delivered for a valuable consideration the above described promissory note to the plaintiff herein; that by such sale and delivery the said defendant warranted and agreed with this plaintiff that the aforesaid note was genuine and forceful and binding upon all parties thereto, and that he had no knowledge of any fact which would tend to prove it, the said note, worthless; that prior to the sale and delivery of said note as aforesaid, the same had been satisfied, all of which was unknown to the plaintiff at the time of the purchase of the said note as aforesaid; that the said note was by the plaintiff duly presented for payment, and payment then and there demanded; that the same was not paid, for the reason that the same had been satisfied as hereinbefore stated; of all of which due notice was given to the defendant." The trial court rendered a judgment dismissing the plaintiff's cause of action, and against the plaintiff for costs and disbursements. An appeal is taken from this judgment.

Bangs, Cooley, & Hamilton, for respondent.

The statute makes no distinction between an indorser before maturity and one after maturity. His rights and liabilities are the same in both cases. *A. B. Farguhar Co. v. Higham*, 16 N. D. 106, 112 N. W.

557; Dan. Neg. Inst. 666; Rev. Codes 1905, Sec. 6368; Rev. Codes 1905, Sec. 6544; Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; Beebe v. Brooks, 12 Cal. 309; Beer v. Clifton, 98 Cal. 323, 20 L.R.A. 580, 35 Am. St. Rep. 172, 33 Pac. 204; Graul v. Strutzel, 53 Iowa, 712, 36 Am. Rep. 250, 6 N. W. 119; German-American Bank v. Atwater, 165 N. Y. 36, 58 N. E. 763; Colt v. Barnard, 18 Pick. 260, 29 Am. Dec. 584; Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75.

The defendant was entitled to notice of dishonor, demand for payment, etc. Merchants' Nat. Bank v. Bentel, 15 Cal. App. 170, 113 Pac. 708; Picklar v. Harlan, 75 Mo. 678.

The death of the maker does not excuse the making of demand. (Sec. 76); Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; Beer v. Clifton, 98 Cal. 323, 20 L.R.A. 580, 35 Am. St. Rep. 172, 33 Pac. 204; Beebe v. Brooks, 12 Cal. 309; Scott v. First Nat. Bank, 71 Ind. 445; Code 1899, Neg. Inst. Law, Sec. 7; Lank v. Morrison, 44 Kan. 594, 24 Pac. 1106.

The plaintiff has not declared as upon a reissue note, but has sued defendant as an indorser. Koons v. McWhinney, 30 Ind. 74.

The defendant is a remote vendee only. There is no privity of contract between the last vendee and a remote vendor. Bordwell v. Collie, 45 N. Y. 494; Nelson v. Armour Packing Co. 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; Smith v. Williams, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394; Thisler v. Keith, 7 Kan. App. 363, 52 Pac. 619; Asher Lumber Co. v. Cornett, 22 Ky. L. Rep. 569, 56 L.R.A. 672, 58 S. W. 438; Prater v. Campbell, 110 Ky. 23, 60 S. W. 918; Pemberton v. Dean, 88 Minn. 60, 60 L.R.A. 311, 97 Am. St. Rep. 503, 92 N. W. 478; Watson v. Chesire, 18 Iowa, 202, 87 Am. Dec. 382.

The note was past due when it was purchased by the plaintiff. Morey v. Wakefield, 41 Vt. 24, 98 Am. Dec. 562; Vinton v. King, 4 Allen, 562; Paine v. Central Vermont R. Co. 14 Fed. 269; Bull v. First Nat. Bank, 14 Fed. 612; Camp v. Scott, 14 Vt. 387; Losee v. Dunkin, 7 Johns. 70, 5 Am. Dec. 245; Herrick v. Woolverton, 41 N. Y. 581, 1 Am. Rep. 461; LaDue v. First Nat. Bank, 31 Minn. 33, 16 N. W. 426; Thompson v. Hale, 6 Pick. 259; Carlton v. Bailey, 27 N. H. 230; American Bank v. Jenness, 2 Met. 288.

Plaintiff is not a purchaser in good faith—nor a holder in due course.

Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; McNamara v. Jose, 28 Wash. 461, 68 Pac. 903; Proctor v. Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Williams v. Huntington, 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336; Watkins v. Goessler, 65 Minn. 118, 67 N. W. 796; Smith v. Jansen, 12 Neb. 125, 41 Am. Rep. 761, 10 N. W. 537; Oppenheimer v. Farmers' & M. Bank, 97 Tenn. 19, 33 L.R.A. 767, 56 Am. St. Rep. 778, 36 S. W. 705; Dunn v. National Bank, 15 S. D. 454, 90 N. W. 1045.

Plaintiff could, in any event, recover no more than the amount he paid. Oppenheimer v. Farmers' & M. Bank, 97 Tenn. 19, 33 L.R.A. 767, 56 Am. St. Rep. 778, 36 S. W. 705; Coye v. Palmer, 16 Cal. 158; Dunn v. National Bank, 15 S. D. 454, 90 N. W. 1045; Harrington v. Butte & B. Min. Co. 19 Mont. 411, 48 Pac. 758; Dresser v. Missouri & O. R. & Constr. Co. 93 U. S. 92, 23 L. ed. 815.

Geo. A. Bangs and Geo. R. Robbins, for appellant.

The obligation of an indorser of a promissory note after maturity, is no different than an indorsement before maturity, except as to the time the instrument becomes due. 7 Cyc. 826; 1 Dan. Neg. Inst. § 724a; Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75; Scott v. First Nat. Bank, 71 Ind. 445; Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; French v. Jarvis, 29 Cann. 347.

The difference between an indorsement before note is due, and one while it is running to maturity, relates only to the time of payment. Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322.

The subsequent indorsement of a note overdue is equivalent to drawing a new bill payable at sight, or within a reasonable time. 1 Dan. Neg. Inst. § 669; 7 Cyc. 822, 973, 1071; 2 Randolph, Com. Paper, § 671; Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75; Coleman v. Dunlap, 18 S. C. 595; Swartz v. Redfield, 13 Kan. 550; Lank v. Morrison, 44 Kan. 594, 24 Pac. 1106; Broun v. Hull, 33 Gratt. 29; Brown v. Davies, 3 T. R. 80; Light v. Kingsbury, 50 Mo. 331; Maddox v. Duncan, 143 Mo. 613, 41 L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 688.

Where a party indorses a bill or note after maturity, he is in effect a drawer of a new bill. 7 Cyc. 1071; Maddox v. Duncan, 143 Mo. 613, 41 L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 688; Dan. Neg. Inst.

§ 669; 2 Dan. Neg. Inst. § 1242; 2 Randolph, Com. Paper, § 683, p. 1090; Callow v. Lawrence, 3 Maule & S. 95, 15 Revised Rep. 423; Mabry v. Matheny, 10 Smedes & M. 323, 48 Am. Dec. 753; Guild v. Eager, 17 Mass. 615; Havens v. Huntington, 1 Cow. 387.

Defendant cannot escape liability upon its uncanceled indorsement. 7 Cyc. 826; 2 Dan. Neg. Inst. §§ 1238, 1242; 3 Randolph, Com. Paper, § 1434; Coleman v. Dunlap, 18 S. C. 595; Mabry v. Matheny, 10 Smedes & M. 323, 48 Am. Dec. 753.

The indorsement of a note which is past due, where the indorser knows the note is paid, or that the maker is dead, or that the instrument has been dishonored, makes the indorser liable to all subsequent parties, as the maker of a new note. Picklar v. Harlan, 75 Mo. 678; Scott v. First Nat. Bank, 71 Ind. 445; St. John v. Roberts, 31 N. Y. 441, 88 Am. Dec. 287; Montgomery & E. R. Co. v. Trebles, 44 Ala. 255; Ward v. Allen, 2 Met. 53, 35 Am. Dec. 387; Brook v. Vannest, 58 N. J. L. 162, 33 Atl. 382; Guild v. Eager, 17 Mass. 615; Moore v. First Nat. Bank, 38 Colo. 336, 10 L.R.A.(N.S.) 260, 120 Am. St. Rep. 120, 88 Pac. 385, 12 Ann. Cas. 268.

In such case, no presentment or demand for payment, or notice of dishonor, is necessary. 2 Dan. Neg. Inst. § 1113; 7 Cyc. 962, 1072; Coleman v. Dunlap, 18 S. C. 591; Picklar v. Harlan, 75 Mo. 678; Williams v. Mathews, 3 Cow. 252; St. John v. Roberts, 31 N. Y. 441, 88 Am. Dec. 287; Montgomery & E. R. Co. v. Trebles, 44 Ala. 255; Copp v. M'Dugall, 9 Mass. 1; Furgerson v. Staples, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158; Davis v. Francisco, 11 Mo. 572, 49 Am. Dec. 98; Burrill v. Smith, 7 Pick. 291.

An indorser cannot show, as against a subsequent holder without notice, that he is not liable under his indorsement. 8 Cyc. 262-268; Thompson v. McKee, 5 Dak. 172, 37 N. W. 567.

All implied warranties attach to due sale of a note, regardless of the manner of transfer. 7 Cyc. 830, et seq.; 1 Dan. Neg. Inst. §§ 670, 730, 736; 2 Randolph, Com. Paper, §§ 720, 757; Note in 10 L.R.A.(N.S.) 542; Ogden, Neg. Inst. pp. 92, 93, 108; Joyce, Defences to Com. Paper, § 348; Sutherland, Damages, p. 1546; Ticonic Bank v. Smiley, 27 Me. 225, 46 Am. Dec. 593; Challiss v. McCrum, 22 Kan. 157, 31 Am. Rep. 181; Mays v. Callison, 6 Leigh, 230; Carroll v. Nodine, 41 Or. 415, 93 Am. St. Rep. 743, 69 Pac. 51; Hannum v. Richardson,

48 Vt. 508, 21 Am. Rep. 152; *Watson v. Chesire*, 18 Iowa, 202, 87 Am. Dec. 382; *Broadus Institute v. Siers*, 68 W. Va. 125, 69 S. E. 468, Ann. Cas. 1912 A 920; *Palmer v. Courtney*, 32 Neb. 781, 49 N. W. 754; *Delaware Bank v. Jarvis*, 20 N. Y. 227; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Drennan v. Bunn*, 124 Ill. 175, 7 Am. St. Rep. 365, 16 N. E. 100; *Daskam v. Ullman*, 74 Wis. 474, 43 N. W. 321; *Ware v. McCormack*, 96 Ky. 139, 28 S. W. 157, 959; *Myer v. Richards*, 163 U. S. 385, 411, 41 L. ed. 199, 209, 16 Sup. Ct. Rep. 1148; *Thrall v. Newell*, 19 Vt. 203, 47 Am. Dec. 682; *Seeley v. Reed*, 28 Fed. 167; *Earnest v. Barrett*, 6 Ind. App. 371, 33 N. E. 635; *Furgerson v. Staples*, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158; 2 Dan. Neg. Inst. § 1113; *Burrill v. Smith*, 7 Pick. 291; *St. John v. Roberts*, 31 N. Y. 441, 88 Am. Dec. 287.

BRUCE, J. (after stating the facts as above). An examination of the complaint will hardly show that the defendant is sought to be held to the liability of an indorser. He is certainly not sought to be held as a maker of a new note. As we construe the complaint, the liability as a vendor or warrantor is alone relied upon. Even if a proper foundation is laid for proof of the liability of an indorser, we are quite satisfied that there is no reason for reversing the judgment of the trial court. Even if we concede that presentment for payment was dispensed with, on which we do not express an opinion, we are perfectly satisfied that no right to a recovery was proved by the plaintiff. All that the plaintiff, himself, paid for the notes in question was \$50, while all that the original purchaser, Titus, paid was \$51. The evidence is conclusive and undisputed that Titus recovered, out of the notes that he purchased, to say nothing of the \$50 received from Valley, more than he paid for all of the notes; and it is also undisputed that the plaintiff recovered from the balance of the notes purchased by him from Valley, more than he, himself, paid for all of the notes so purchased. The law seems to be well established that, in the case of an indorsement or transfer of a negotiable instrument after its dishonor or maturity, where the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee, in an action against the indorser, can recover only the consideration he has actually paid. The face of the note sued upon was \$600. The amount paid for all of the notes

by Titus was \$51, and by the plaintiff, \$50. Under the authorities, plaintiff's right of recovery, therefore, would be limited in any event to \$50. Even this right of recovery he has not proved, as it is conclusively shown that he bought the notes in bulk, that is to say, notes of the face value of from sixteen hundred to seventeen hundred dollars, including the note in question, and that he has already realized on such bulk purchase more than the \$50 that was paid. See *Coye v. Palmer*, 16 Cal. 159; *Cook v. Cockrill*, 1 Stew. (Ala.) 475, 18 Am. Dec. 67; *Brown v. Mott*, 7 Johns. 361; *Braman v. Hess*, 13 Johns. 52; *Munn v. Commission Co.* 15 Johns. 44, 8 Am. Dec. 219; *Youse v. M'Creary*, 2 Blackf. 243; *Arents v. Com.* 18 Gratt. 750; *Davis v. Miller*, 14 Gratt. 1.

There is no question that the note under consideration was past due, both when purchased by Vallyly and when purchased by the plaintiff. It was a demand note, dated January 16, 1904. It was purchased by the plaintiff on March 6, 1905. It is well established that a note payable on demand is due within a reasonable time after its date, and there are practically no authorities which hold that such reasonable time can be extended beyond a year. *Rev. Stat. 1905, Sec. 6355*; *Morey v. Wakefield*, 41 Vt. 24, 98 Am. Dec. 562; *Camp v. Scott*, 14 Vt. 387; *Vinton v. King*, 4 Allen, 562; *Thompson v. Hale*, 6 Pick. 259; *Paine v. Central Vermont R. Co.* 14 Fed. 269; *Bull v. First Nat. Bank*, 14 Fed. 612; *Losee v. Dunkin*, 7 Johns. 70, 5 Am. Dec. 245; *Herrick v. Wolverton*, 41 N. Y. 581, 1 Am. Rep. 461; *LaDue v. First Nat. Bank*, 31 Minn. 33, 16 N. W. 426; *Carlton v. Bailey*, 27 N. H. 230; *American Bank v. Jenness*, 2 Met. 288. There can therefore be no liability as an indorser under §§ 6366 and 6367 of the Civil Code of 1905.

Nor can any liability be founded upon the theory that there was a new indorsement and a new issue of the notes. In the first place, there is no foundation laid for any such claim or liability in the pleadings. In the second place, there is no proof whatever that there was any such new indorsement or reissue. The note in question was not physically indorsed after maturity. It was at the most only sold to the original purchaser, Titus, in the condition it was in when it was among the profit and loss papers of the defendant. The total inadequacy of the consideration, and the collateral agreement, absolutely negative any presumption of a reissue or reindorsement. Such being the case, it

was not a note which had been indorsed after maturity and then sold, but one which had been indorsed before maturity and sold as a chattel in such condition. It is quite clear from the authorities that in such a case the plaintiff would have no further or greater rights than would the original purchaser, Titus. *Huddleston v. Kempner*, 3 Tex. Civ. App. 252, 22 S. W. 871; *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733; *Kernohan v. Durham*, 48 Ohio St. 1, 12 L.R.A. 41, 26 N. E. 982; *Simons v. Morris*, 53 Mich. 155, 18 N. W. 625; *Mayfield Grocer Co. v. Price*, 43 Tex. Civ. App. 391, 95 S. W. 31; *Brown v. Smedley*, 136 Mich. 65, 98 N. W. 856; *Chase v. Whitmore*, 68 Cal. 545, 9 Pac. 942. It is also clear that this is a case where the clause of § 6367, Rev. Codes 1905, that "when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee," would apply. There is no liability, in short, under § 6367, for the simple reason that the transfer to Titus, in spite of the alleged indorsement, was a transfer by delivery only, that is to say, a sale of a chattel, rather than an indorsement.

Nor can there be any liability under § 5428, which provides that "one who sells or agrees to sell an instrument purporting to bind anyone to the performance of an act, thereby warrants . . . that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, when that is material, the extinction of its obligations, or its invalidity for any cause." This section of the statute is not a section which relates or pertains to indorsers of, or, necessarily, to commercial paper at all. It is a section which relates to vendors of chattels and to the liability of such. Its warranty, therefore, is not the warranty of an indorser, but the warranty of a vendor, and is a warranty that is personal to the vendee.

Even as far as the vendee is concerned, the inadequacy of the consideration and the collateral agreement positively negative any liability on the part of the vendor. Even if there was any liability, as we have before stated, it was personal to the vendee, Titus. The suit before us is not a suit between Titus and the mercantile company, but between the assignee or indorsee of an assignee or indorsee of the said Titus and the company. Such being the case, and since there is no allegation of any prior assignment by Titus of his cause of action, if any he had, there can be no liability to the plaintiff in this suit. Bord-

well v. Collie, 45 N. Y. 494; Nelson v. Armour Packing Co. 76 Ark. 353, 90 S. W. 288, 6 Ann. Cas. 237; Smith v. Williams, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394; Thistler v. Keith, 7 Kan. App. 363, 52 Pac. 619; Ashler Lumber Co. v. Cornett, 22 Ky. L. Rep. 569, 56 L.R.A. 672, 58 S. W. 438; Prater v. Campbell, 110 Ky. 23, 60 S. W. 918; Pemberton v. Dean, 88 Minn. 60, 60 L.R.A. 311, 97 Am. St. Rep. 503, 92 N. W. 478; Watson v. Chesire, 18 Iowa, 202, 87 Am. Dec. 382.

The judgment of the District Court is affirmed.

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3. An order of the district court in an action for damages on appeal from a judgment for plaintiff in a justice court, denying a motion by the defendant to reverse and set aside the judgment of the justice court upon the ground that the damages involved were for injury to real property, and that the justice had no jurisdiction because the pleadings were not in writing and verified as required by N. D. Rev. Codes 1905, § 8392, does not "involve the merits of an action or some part thereof" within the meaning of § 7225, subdiv. 4, as amended by chap. 79, Laws of 1907, making orders of that description appealable to the supreme court. *Whitney v. Ritz*, 576.

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5. The point need not, in order to be saved on appeal, be specially pointed out on the motion for a new trial, where the court in a tort action, instead of leaving the matter to the discretion of the jury, commits the error of instructing them to award interest in case of a finding for plaintiff. *Seckerson v. Sinclair*, 625.
6. Exceptions need not be taken and filed to the findings of fact and conclusions of law to enable the appellate court to examine a stipulated record, embodied in a settled statement of the case, in which specifications of error of fact and of law challenge both the conclusions and the findings. *State ex rel. Minehan v. Thompson County Auditor*, 273.
7. Under the North Dakota statutes, no exceptions to findings of fact can be taken or are necessary, and an exception can be taken only to errors of law,

APPEAL AND ERROR—continued.

- and then only with respect to matters not mentioned in N. D. Rev. Codes 1905, § 7054, wherein findings and other orders are by statute deemed excepted to. *State ex rel. Minehan v. Thompson County Auditor*, 273.
8. An appellate court cannot say that a complaint, not objected to, for injuries from the negligent operation of an elevator, alleging that the defendant lowered the elevator suddenly and without warning, though vulnerable to a motion to make more definite and certain, was incapable of supporting a verdict based on evidence that the sudden lowering of the elevator was the result of a defective system of signals. *Wylde v. Patterson*, 218.
 9. An appellate court cannot say that rulings of the trial court sustaining objections to questions asked a witness were either erroneous or prejudicial, when no offer of proof was made. *State v. Schoenberg*, 532.
 10. On an appeal from a judgment alone, the question of the sufficiency of the evidence is not properly before the court for decision, although attempted to be raised by an assignment of error, where the sufficiency of such evidence was in no manner challenged at the trial, but only by a motion for a new trial made long after the entry of such judgment. *Heald v. Strong*, 120 (on rehearing).
 11. The provision of N. D. Const. § 101 that every point fairly arising upon the record of the case shall be considered and decided, is not violated by the rule that on appeal from a judgment alone, the question of the sufficiency of the evidence is not properly before the court for decision, where the sufficiency of such evidence was in no manner challenged at the trial, but only by a motion for a new trial made long after the entry of such judgment. *Heald v. Strong*, 120 (on rehearing).

BONDS AND UNDERTAKINGS ON APPEAL.

Bond to stay proceedings, see *infra*, 20, 21.

On appeal from justices' court, see *Justices of the Peace*, 8.

12. An appeal bond, the conditions of which substantially cover the provisions of the statute and secure to the respondent all that the law has designed for him, is sufficient, although not in the exact words of the statute. *Burger v. Sinclair*, 315, 140 N. W. 231.
13. The bond upon an appeal in which the defendant is appellant is not invalidated by the fact that instead of using the word "appellant," it recites through clerical error that the obligors undertake that the appellant will pay all costs and damages which may on the appeal be awarded against "plaintiff," where the intention of the parties elsewhere in the instrument, and by the instrument as a whole, is made perfectly clear. *Burger v. Sinclair*, 315.
14. An undertaking for the payment of costs on appeal to the supreme court is de-

APPEAL AND ERROR—continued.

- fective, where the affidavit of justification of the sureties fails to state that they are worth the sum stated therein over and above their debts and liabilities "in property within this state not by law exempt from execution," as prescribed in N. D. Rev. Codes 1905, § 7221. *Burger v. Sinclair*, 326.
15. An undertaking for the payment of costs on appeal to the supreme court, which is not conditioned, as prescribed by N. D. Rev. Codes 1905, § 7208, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, is defective, and, unless the defect is cured, the appeal will be dismissed. *Burger v. Sinclair*, 326.
 16. An order of the supreme court providing that an appeal shall be dismissed unless the appellant shall, within twenty days from the date thereof, file with the clerk of the supreme court an undertaking for costs in compliance with the statute, with sureties to be approved by the clerk of the district court, does not require dismissal for failure of the appellant to file the bond long enough before the expiration of that time to give the respondent opportunity for exception to and justification of the sureties within that time, but is complied with if the bond is filed as directed, with the sureties approved by the clerk of the district court within that time; although, of course, under the order the respondent is entitled to insist upon the justification of the sureties, but not within the twenty days. *Burger v. Sinclair*, 315.
 17. An undertaking for the payment of costs on an appeal to the supreme court by a defendant is defective for noncompliance with the requirement of N. D. Rev. Codes 1905, § 7208, that it be conditioned to the effect that appellant will pay all costs and damages which may be awarded against him on the appeal not exceeding \$250, where it is conditioned that he will "pay all costs and damages herein and hereby if the judgment and order denying a motion for a new trial be affirmed herein, and any and all costs and damages, if any there be, awarded the plaintiff . . . in case the order . . . and judgment herein entered shall be affirmed," since it does not cover the contingency of the dismissal of the appeal. *Burger v. Sinclair*, 326.
 18. Where an undertaking for the payment of costs on appeal to the supreme court is defective for failure of the affidavit of justification of the sureties to state that they are worth the sum stated therein, over and above their debts and liabilities, "in property within this state not by law exempt from execution," as prescribed in N. D. Rev. Codes 1905, § 7221, leave will be given upon due application in the supreme court to supply the defect, pursuant to the provisions of North Dakota Rev. Codes, 1905, § 7224, even though the time for appealing has expired, where it appears that notice of appeal was given in good faith, and that the defect was occasioned through mistake or accident. *Burger v. Sinclair*, 326.
 19. An undertaking for the payment of costs on appeal to the supreme court, which is defective for noncompliance with the provision of N. D. Rev. Codes 1905,

APPEAL AND ERROR—continued.

§ 7208, that it be conditioned to the effect that the appellant will pay all costs which may be awarded against him on the appeal not exceeding \$250, in that the condition fails to cover costs and damages which may arise upon dismissal of the appeal, as distinguished from affirmance of the judgment and order appealed from, is neither a nullity nor so seriously defective as to be without the protection of § 7224, and the appellant will be given leave in the supreme court to cure the defect by filing a new undertaking under the provisions of that section, where it appears that notice of appeal was given in good faith, and that the defect was occasioned by a mistake or accident, even though the time for appealing has expired. *Burger v. Sinclair*, 326.

SUPERSEDEAS AND STAY OF PROCEEDINGS.

20. The supreme court, in the light of the plain provisions of the appeal statute providing for, and regulating, the giving of undertakings to stay proceedings, is clothed with no inherent power to grant on an appeal from a judgment for money only a stay of proceedings, where the appellant in appealing has intentionally omitted to give any undertaking to stay proceedings. *Burger v. Sinclair*, 326.
21. One who, appealing to the supreme court from a judgment for money only, has intentionally omitted to give an undertaking to stay proceedings, cannot, under the provision of N. D. Rev. Codes 1905, § 7224, for the supplying in the supreme court of acts necessary to the perfecting of appeals or the stay of proceedings left undone through mistake or accident, be afforded any relief in the way of being permitted in the supreme court to file a superseas undertaking; and an order of a member of that court permitting the filing of such undertaking in such case will, upon due motion by the respondent, be held to have been improvidently made and be vacated. *Burger v. Sinclair*, 326.

RECORDS AND PROCEEDINGS NOT IN RECORD.

22. The trial court has a broad discretion in granting extensions of time to enable counsel to prepare and cause to be settled a statement of a case, the exercise of which will seldom be interfered with, and never except in cases of manifest abuse thereof. *Heald v. Strong*, 120.
23. Within the meaning of the provisions of N. D. Rev. Codes 1905, § 7058, that in a settled statement of a case must be incorporated a specification of the particulars wherein the evidence is alleged to be insufficient, and of the errors of law upon which the party settling intends to rely, and that where no such specifications are made the statement shall be disregarded on motion for a

APPEAL AND ERROR—continued.

new trial and on appeal, one having a statement of a case settled makes no such specifications at all, where the only thing that purports to contain such is an allegation "that the evidence in this case is insufficient to justify the findings of fact and conclusions of law made by the court." *Updegraff v. Tucker*, 171.

24. The supreme court would appear to be justified in disregarding the abstract, where one appealing in a case not to be tried anew there, instead of observing the provision of its rules 7 and 12 that the evidence be reduced to a narrative form and the superfluous evidence be excluded, presents an abstract which is practically a transcript of the evidence; and consists of at least four times the amount of printing necessary to raise the questions presented. *Cysewski v. Fried*, 152.
25. A judgment in plaintiff's favor, quieting her title to land held by her as tenant in common with her husband, and under an unrecorded deed from him of his interest therein, as against a subsequent judgment against him, cannot be sustained on the ground that the levy and sale under the judgment were a nullity, because the premises were a homestead, where the record does not disclose their homestead character, the question as to their homestead character is not covered in the stipulated facts, and the pleadings raise no such issue, the complaint alleging that plaintiff is the owner in fee. *Ildvesen v. First State Bank*, 227.

ASSIGNMENT OF ERRORS.

26. On appeal by the defendant from a judgment based upon the warranty of a horse sold to plaintiff at auction, the court will not notice an assignment of error that there was no evidence offered showing or tending to show that the defendant warranted the horse, where plaintiff's contention is not that the defendant personally warranted it, but rather that it was warranted by the auctioneer at the time of the sale, and that defendant is bound for the breach of that warranty. *Cysewski v. Fried*, 152.

DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

On appeal from justices' court, see *Justices of the Peace*, 3-8.

See also *supra*, 15-17.

27. The fact that the appellant serves notice upon the respondent that he will abandon an appeal is sufficient ground for an application to the court to have it dismissed; but until such dismissal is ordered, the appeal remains effective and will be considered upon its merits. *Getchell v. Great Northern R. Co.* 487.

APPEAL AND ERROR—continued.

28. In determining the effect to be given to an affidavit of a third party, filed, with other affidavits, by appellant pending appeal, to procure a new trial, its contents should be taken in connection with the other affidavits and the nature of the proceedings and purposes for which the affidavit was filed. *McCarty v. Kepreta*, 395.
29. An affidavit of a third party, filed by appellant's attorney, pending appeal, to procure a new trial, incidentally showing that appellant's defense was without merit, taken in connection with contrary affidavits of appellant and his attorney, should not be held to constitute a judicial admission by appellant of an absence of merit in his appeal. *McCarty v. Kepreta*, 395.
30. An affidavit of a third party, filed by appellant, pending appeal, to secure a remand of the record, so that he might move for a new trial, incidentally showing that his defense was without merit, should not be given the effect of a judicial admission of such fact, where the application to remand has been denied, and the supporting affidavits are all superseded matter and are no longer before the court for any purpose. *McCarty v. Kepreta*, 395.
31. In case of a substantial doubt as to whether an affidavit, filed by appellant, pending appeal, should be construed as a judicial admission of want of merit in his appeal, where an explanation as to the circumstances of its filing warrant the exercise of discretion by the court, such affidavit should be held not to amount to such a judicial admission, as the holding of the court should be toward relieving a party from the inadvertent or unintentional admissions of counsel, where the same, if applied, become a judicial admission and, as a matter of procedure, regardless of merit, abrogate the appeal. *McCarty v. Kepreta*, 395.
32. To justify the dismissal of an appeal on the ground that an affidavit of a third party, filed by appellant, pending appeal, to procure a new trial, constitutes a judicial admission that his defense was without merit, there should be no doubt of the intent of the appellant to adopt the statements of the affidavit as his own for all purposes of the case, and the statements thus adopted must not be susceptible of an explanation consistent with good faith in the appellant. *McCarty v. Kepreta*, 395.
33. An appellate court is not bound to dismiss an appeal, even though an affidavit filed by appellant, pending appeal, to procure a new trial, showing that his defense was without merit, be considered as a judicial admission, but the court may, at its discretion, upon proper showing, relieve him from such admission. *McCarty v. Kepreta*, 395.
34. Although the failure of one appealing to the supreme court to file therein an abstract and brief twenty-five days prior to the next regular term thereof, constitutes ground for the dismissal of the appeal in the sound discretion of that court, a motion to dismiss upon that ground will be denied, where the delay is slight and appellant appears to have proceeded in good faith and

APPEAL AND ERROR—continued.

with due diligence, and has shown facts excusing such delay. *Burger v. Sinclair*, 328.

CALENDARS.

35. The requirement of N. D. Rev. Codes 1905, § 3758, that the supreme court upon due application and showing advance upon its calendar certain cases in which the public has a direct interest, does not prohibit the court from advancing other causes, but leaves the latter matter entirely within the control and discretion of the court. *Burger v. Sinclair*, 315.
36. Where a perfectly solvent defendant and appellant in three cases raising practically the same issues has neglected to file supersedeas bonds within the statutory period because his counsel, though directed by him so to do, did not, either because he thought the filing unnecessary under the statute, or that on account of the solvency of all the parties concerned no levy would be made or attempted before affirmance of the judgment; and, during the term of the supreme court for which the cases are set for argument, discovers not only that the plaintiffs are about to levy, but that some of them have disposed of some of their property so that, in case of reversal of the judgments, the recovery of damages for the unauthorized levies may be difficult and problematical; and makes application to the supreme court for leave to file supersedeas bonds or make any cash deposit required of him, which motion on account of the strict wording of N. D. Rev. Codes 1905, § 7208, is denied; and it appears to the supreme court that, by advancing the cases, they may be disposed of so that if the judgments are reversed the levy will be unnecessary,—the court will exercise its discretion to advance them. *Burger v. Sinclair*, 315.

REVIEW.

37. An order denying a motion for judgment on the pleadings is reviewable on appeal from the judgment. *Christofferson v. Wee*, 506.
38. Where a motion for a new trial based upon alleged insufficiency of the evidence is made and denied after judgment, and no appeal from the order taken, the supreme court will not, on appeal from the judgment, consider assignments based solely upon alleged insufficiency of the evidence. *Heald v. Strong*, 120.
39. Affidavits and certificates dated and filed some four months after the denial by the trial court of a motion to dismiss an appeal from the justice to the district court, in an attempt to supply necessary proof on such motion, cannot be considered on appeal from the denial of the motion. *Willard v. Mohn*, 386.

APPEAL AND ERROR—continued.

—DISCRETION OF LOWER COURT.

See also Counties, 12.

40. That a defendant against whom has been regularly entered a judgment on default delays without excuse for nearly eight months after knowledge of the entry to move for its vacation is sufficient to make it not an abuse of discretion to refuse the motion, especially where there is a strong showing of want of good faith in the defendant. *Murphy v. Minot Foundry & Mach. Co.* 185.
41. Under N. D. Codes 1905, § 6825, which provides, substantially, that any person interested may, "before the trial," intervene in any action, and that an intervention is made by complaint "filed by leave of the court," it is not an abuse of discretion for the trial court in a mandamus proceeding to refuse a third person interested in the success of the defense leave to intervene, where he asks for the same after a general demurrer to the answer has been interposed and argued, even though a decision has not been rendered thereon, the purpose of the petitioner for intervention being to set up in his answer and press by appeal defenses which the defendant will not urge, but which if not specially pleaded by the defendant were necessarily involved in the issues as presented; and especially is this true where the one seeking to intervene has, himself, appeared as counsel for the defendant, and has been perfectly aware of all the defenses which would be urged by the defendant. *State ex rel. Fargo v. Mitchell*, 196.

—QUESTIONS OF FACT.

42. The findings of the trial court on the facts are entitled to the same weight on appeal as the findings of a jury. *State v. Banks*, 21.
43. The findings of the trial court on the facts will not be reversed on appeal, if there is any substantial evidence to sustain them. *State v. Banks*, 21.
44. The findings of fact of the trial court, in an action at law in which a jury has been waived, will not be disturbed on appeal, where they have any substantial support in the evidence. *Updegraff v. Tucker*, 171.

—HARMLESS ERROR.

In criminal prosecution, see Criminal Law, 2-7; Homicide, 5-7.

See also *infra*, 52.

45. Error in the admission of testimony is nonprejudicial to the adverse party, where, without his objecting, the same matters embraced in the questions

APPEAL AND ERROR—continued.

- and answers have, immediately prior to the asking of such questions, been fully covered by the witness. *Heald v. Strong*, 120.
46. It is prejudicial error to permit the son of one of the parties to a contract to testify to his understanding of the contract from the conversation of the parties, instead of being required to detail such conversation, where the terms of the contract constitute the vital and controlling issue. *Mulroy v. Jacobson*, 354.
47. The allowance, in an action for injury to property by fire, of testimony relative to the difference in value of certain land before and after the fire for the purpose of growing grass of a certain character, if erroneous upon the ground that the true measure of damages in such cases is the difference in value of the land before and after the fire, works no prejudice to the defendant, where the court in its instructions in three separate cases emphatically tells the jury not to pay any attention to such testimony, and to confine their verdict to other articles enumerated in the complaint, all of which are buildings or personal property. *Seckerson v. Sinclair*, 825.
48. It is prejudicial error to receive in evidence letters written by one party to the other long after they had entered into a contract, which letters contain many self-serving declarations as to the writer's version of the contract, where the crucial issue of fact is, Which party is correct as to its terms? *Mulroy v. Jacobson*, 354.
49. The rejection of evidence of witnesses as to the probability or possibility of their hearing the locomotive bell ring or its whistle blow just prior to the accident is immaterial error, when it was the duty of a traveler killed at a crossing to look and listen for the approach of trains, regardless of whether signals were given or not. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
50. While, in the absence of a request so to do, it is not reversible error to omit to instruct upon some particular point which is covered in a general way in the charge, still a total failure to instruct upon the essential and controlling issues constitutes prejudicial error. *Putnam v. Prouty*, 517.
51. Objection to a charge telling the jury that the defendant has produced a number of witnesses who have in some instances "squarely contradicted" the evidence produced by the plaintiffs; that this conflict of evidence it is the duty of the jury to "harmonize" in the light of the evidence and circumstances in the case; and that the fact that one witness squarely contradicts another on a point does not necessarily nullify the evidence upon the point, but that the means of knowing the facts testified to by certain witnesses could be such as to convince the jury that such witnesses were telling the truth while the others have testified falsely,—upon the ground that squarely contradictory evidence cannot be harmonized, while technically meritorious, is unworthy of consideration. *Seckerson v. Sinclair*, 625.

APPEAL AND ERROR—continued.**DETERMINATION AND DISPOSITION OF CAUSE.**

52. A judgment will be reversed on appeal, where respondent admits in his brief that prejudicial error in his favor occurred on the trial. *Paulson v. Reeds*, 211.
53. A new trial need not be ordered for error in a judgment in replevin in not being in the alternative, and error in the verdict in including in the value of the property the value of part of the property returned before the trial, and in not specifically describing the property, where there is no dispute in the evidence as to the value of the balance, and no question as to the description of the property, but the judgment may be made to conform to the facts, if the respondent will consent thereto. *Smith v. Willoughby*, 1.

APPEARANCE.

No appearance which will prevent the entry of a regular judgment by default is made, in an action against a corporation, by service, upon the plaintiff's attorney, by the director served with summons and complaint, of an instrument entitled "motion to dismiss" entitled in the action, and reciting that he, "the person upon whom the complaint was served in the foregoing entitled matter," comes and "appears specially and objects" to the jurisdiction of the court on the ground that the corporation has ceased as such to exist, and that therefore he moves for dismissal. *Murphy v. Minot Foundry & Mach. Co.* 185.

ARGUMENT OF COUNSEL.

Prejudicial error in, see *Homicide*, 7.

ARREST.

Right to make, in action for seduction, see *Execution*, 2.

ASSESSMENTS.

For drains, see *Counties*, 13-18; *Drains*; *Mandamus*, 3.

Limitation of action to set aside, see *Limitation of Actions*.

Sufficiency of title of statute limiting time to commence action to vacate, see *Statutes*.

ASSIGNMENT.

Of mortgage, see Mortgage.

Effect of, on right to set off counterclaim, see Set-Off and Counterclaim, 1.

ASSIGNMENT OF ERRORS. See Appeal and Error, 26.

ASSUMPTION OF RISK.

By employee, see Master and Servant, 6.

ATTACHMENT.

An affidavit for attachment in an action against two defendants, which alleges that the "defendant" is about to remove his residence, and that the debt was incurred for property obtained under false pretenses, is not insufficient because it does not allege which defendant is about to remove his residence, and which defendant made the false pretenses. *Ildvedsen v. First State Bank*, 227.

AUCTIONS AND AUCTIONEERS.

1. At common law an auctioneer cannot, in the absence of authority so to do, warrant the property sold. *Cysewski v. Fried*, 152.
2. Under N. D. Rev. Codes 1905, § 5799, providing that "an auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller only as follows: . . . 3. To warrant in like manner with other agents to sell according to § 5776," and § 5776 reading, "An authority to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property"—an auctioneer of a horse will, by warranting its qualities, bind the seller, even though he has instructions from the latter not to warrant, if the purchaser has not before or at the time of the purchase been made actually or constructively aware of such instructions. *Cysewski v. Fried*, 152.

BAIL.

Sufficiency of evidence of nonsurrender of principal by bondsmen, see Evidence, 24.

BAILMENT.

Extent of recovery by bailee, see Damages, 1.

BALLOTS.

Admissibility of, in evidence, see Evidence, 5, 6.

BANKS AND BANKING.**NOTICE TO OFFICER OR AGENT.**

To bank president purchasing note given to
bank, see Bills and Notes, 3-11.

1. The president of a bank will be conclusively presumed in law to have had as a private individual whatever knowledge he had or ought to have possessed as an official. *McCarty v. Kepreta*, 395.
2. A bank cashier's actual knowledge of the want of consideration of a note given to it is conclusively presumed in law to have been communicated to the board of directors, where no interest hostile to the bank or in fraud of its stockholders or depositors is asserted. *McCarty v. Kepreta*, 395.
3. Knowledge by the board of directors of the want of consideration for a note given to a bank, presumed to have been communicated to them by the cashier, is presumed to have been had by the president at the time he purchased the note from the bank acting by the cashier. *McCarty v. Kepreta*, 395.
4. The notice imputed to the president of a bank, purchasing from it a note given for an excess loan, concerning such note, is not simply constructive notice, but is actual notice. *McCarty v. Kepreta*, 395.
5. The president of a bank, purchasing from it a note given to it for an excess loan, is chargeable with knowledge of the bank's violation of the law forbidding excess loans. *McCarty v. Kepreta*, 395.
6. The presumption that a bank president and director received the knowledge possessed by the cashier as to want of consideration for a note purchased by the president from the bank is a conclusive presumption of actual knowledge thereof, estopping the president from claiming to be a holder in due course to the same extent that it would have operated upon the cashier individually who negotiated the loan. *McCarty v. Kepreta*, 395.

COLLECTIONS.

7. Where one agrees to sell another lands, no place having been specified upon for the closing of the deal, and the latter in accepting the offer writes, inclosing part payment and a warranty deed, stating that the former can execute the same and have his bank send it to a designated bank, and that he will take it up, and the former in pursuance sends such designated bank

BANKS AND BANKING—continued.

not only the deed, but also a sight draft for the balance due, in a letter containing specific instructions to deliver the deed on payment of the draft, and to remit by designated exchange, such designated bank is made the former's agent to receive such balance of the purchase price by collecting the draft, and to deliver the deed, and not the latter's agent. *Schafer v. Olson*, 542.

8. One purchasing land from another, who has constituted a bank his agent to receive payment of the balance of the price by having sent it for collection a sight draft covering the same and the deed for delivery, makes valid payment to the bank, which will bind the vendor in case of the bank's failure through insolvency to remit, where the purchaser's agent, having at the time a balance standing to his credit at the bank amply sufficient to cover the amount, gives a check drawn upon the same payable to the order of the bank eight days before the bank closes its doors, such agent having no knowledge of the insolvency of the bank or reason to fear its condition, it being at the time a going institution and not shown to be insolvent at the time in fact, and the bank accepts the check, delivering the deed; and it makes no difference that the check is not charged against such agent's account until done so by the bank examiner after taking charge. *Schafer v. Olson*, 542.

BIDS.

On municipal contract, see *Municipal Corporations*, 1-3.

BILLS AND NOTES.

Counterclaim in action on note, see *Set-Off and Counterclaim*, 4.

Conversion of notes, see *Trover and Conversion*.

NEGOTIABILITY.

1. A special clause in a note to the effect that "payee's ownership of goods account of which this note is given, the account thereof, and contract condition of original sale, are not affected by accepting this note until the receipt of the full amount due thereon," neutralizes the otherwise unconditional promise to pay, required by N. D. Rev. Codes 1905, § 6303, and destroys the negotiability of the instrument. *Fleming v. Sherwood*, 144.

RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

2. The title to notes transferred by their owner to a party agreeing to procure insurance for the former in exchange for the notes did not pass uncon-

BILLS AND NOTES—continued.

ditionally to the latter pursuant to the contract, but he acquired merely a conditional title to the notes, dependent upon his furnishing the policy agreed upon. *Mulroy v. Jacobson*, 354.

—BONA FIDE PURCHASERS.

3. The president of a bank, who purchases from it a note for which it gave no consideration, being chargeable with notice of the fraud of the bank in so negotiating the note, is not a holder in due course. *McCarty v. Kepreta*, 395.
4. The presumption of the possession by the president of the cashier's knowledge of the want of consideration for a note given to a bank will, if such defense is established, render impossible a recovery on the note by the president as the transferee from the bank. *McCarty v. Kepreta*, 395.
5. The banking laws making a note without consideration a fictitious asset of the bank, and imposing upon the directors and managing officers the duty of making it good, conclusively negative the claim that the president, purchasing such note from the bank, is a holder in due course, when the bank was not such holder. *McCarty v. Kepreta*, 395.
6. The negotiable instruments act, N. D. Rev. Codes 1905, chap. 90, does not operate to constitute the president of a bank a holder in due course of a note purchased by him from it, for full value, before maturity, without personal knowledge of any defense thereto, where from his relationship to the payee, the bank, he is presumed, under the banking laws, to have had actual knowledge of the facts under which the note was executed by the maker and obtained by the bank. *McCarty v. Kepreta*, 395.
7. The provision in N. D. Rev. Codes 1905, § 6358, that to constitute notice of an infirmity in a note necessary to render a purchaser not a holder in due course, he must have had actual knowledge of the infirmity, does not apply to the purchase by the president from a bank of a note executed to it without consideration. *McCarty v. Kepreta*, 395.
8. The relationship of the indorsee to the payee and the law thereto applying must be considered with and as supplementing the negotiable instruments act in determining whether the indorsee is a holder in due course within the definition thereof in such act. N. D. Rev. Codes 1905, § 6354. *McCarty v. Kepreta*, 395.
9. Want of consideration is available as a defense against the enforcement by the president of a bank of a note purchased by him from it, for full value, before maturity, without personal knowledge of such infirmity. *McCarty v. Kepreta*, 395.
10. Proof that the purchaser of a note from a bank is the president thereof is 24 N. D.—43.

BILLS AND NOTES—continued.

sufficient foundation for the introduction of proof of the defense of want of consideration. *McCarty v. Kepreta*, 395.

11. Proof by the president of a bank of nonresidence, failure to participate in its management, and consequent ignorance of the facts under which the bank obtained a note, does not relieve him from the knowledge of the bank officers presumed in him, and is immaterial on the question of his good faith in the purchase of the note from the bank. *McCarty v. Kepreta*, 395.
12. A note which is payable on demand will be considered purchased when overdue, if purchased more than a year after its date. *McAdam v. Grand Forks Mercantile Co.* 645.

WARRANTY BY SELLER.

13. The warranty of the seller, under § 5428, Rev. Codes, 1905, providing that one who sells "an instrument purporting to bind anyone to the performance of an act thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all parties thereto, and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as insolvency of any of the parties thereto, when that is material, the extinction of its obligations or its invalidity for any cause," is a warranty to his vendée merely, and not one running with the paper. *McAdam v. Grand Forks Mercantile Co.* 645.

MATURITY.

14. A note payable on demand is due within a reasonable time after its date. *McAdam v. Grand Forks Mercantile Co.* 645.

COMPLAINT.

15. A complaint in an action to recover the amount of a promissory note payable to the defendant states a cause of action against him, not as indorser of a note, but as vendor and warrantor of the chattel merely, where the allegations are that the defendant sold and delivered for a valuable consideration the note to the plaintiff; that by such sale and delivery the defendant warranted and agreed with the plaintiff that the note was genuine, forceful, and binding upon all parties thereto, and that he had no knowledge of any fact which would tend to prove it worthless; that prior to such sale and delivery of the note the same had been satisfied, all of which was unknown to the plaintiff at the time of the purchase, and that payment of the note was, on presentment and demand, not made

BILLS AND NOTES—continued.

for the reason that the same had been so satisfied. *McAdam v. Grand Forks Mercantile Co.* 645.

AMOUNT OF RECOVERY.

16. In the case of an indorsement of a negotiable instrument after its dishonor or maturity, and where the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee in an action against the indorser can recover only the consideration he has actually paid. *McAdam v. Grand Forks Mercantile Co.* 645.

BILLS OF PARTICULARS.

To cure uncertainty in pleading, see *Pleading*, 7.

BOARD.

Delay in payment of, for a judgment debtor held under body execution as ground for discharge, see *Habeas Corpus*, 2.

BODY EXECUTION. See *Execution*, 2; *Habeas Corpus*.

BONA FIDE PURCHASER.

Of note, see *Bills and Notes*, 3-12.

Of land, see *Vendor and Purchaser*, 7-12.

BONDS.

On appeal, see *Appeal and Error*, 12-21; *Justices of the Peace*, 8.

Mandamus by surety to compel acceptance of, see *Mandamus*, 2.

Defense to mandamus to compel issuance of certificate that municipal bonds are legally issued, see *Mandamus*, 8.

Approval of grain elevator bonds, see *Warehousemen*.

BURDEN OF PROOF. See *Evidence*, 1, 2.

CALENDAR.

Of appellate court, see *Appeal and Error*, 35, 36.

CANCELATION OF INSTRUMENTS.

1. The successful plaintiff in a suit against his grantee to set aside the deed on the ground of mental incompetency must plead the fraudulent intent of such grantee and his knowledge of plaintiff's incompetency, if he would escape having to pay back as a condition of the cancelation of the deed any consideration paid him by the defendant. *Parsons v. Lee*, 639.
2. Allegations of the complaint in a suit to set aside plaintiff's deed upon the ground of his mental incapacity, that he was afflicted with fits or periods of mental incompetency, and that he was mentally incompetent at the time of the execution, may be properly supported by evidence that he was an epileptic and feeble-minded all his life. *Parsons v. Lee*, 639.

CANVASS.

Of county division election, see *Counties*, 1-12; *Mandamus*, 4-7, 11, 12.

CASE.

On appeal, see *Appeal and Error*, 22-25.

CERTIFICATE.

Consideration of, on appeal, see *Appeal and Error*, 39.

Of result of county division election, see *Counties*, 8, 9; *Mandamus* 4, 6, 11, 12.

Defense to mandamus to compel issuance of certificate that municipal bonds are legally issued, see *Mandamus*, 8.

CERTIORARI.

1. Certiorari will not lie to review alleged errors not going to the jurisdiction of the inferior court; nor will it lie where the party aggrieved has an adequate remedy by appeal. *State ex rel. Noggle v. Crawford*, 1.
2. The supreme court will not review by certiorari an order of the district court permitting claimants of a fund which had been deposited with the clerk of court by a garnishee, to intervene for the purpose of asserting rights therein, as in making such order the court did not exceed its jurisdiction, and at most the order is erroneous merely, and may be corrected by appeal. *State ex rel. Noggle v. Crawford*, 8.

CHANGE OF VENUE.

Amendment of indictment or information, see Indictment and Information.

CLAIM AND DELIVERY.

Extent of delivery, see Damages, 1.

Counterclaim in action for, see Set-Off and Counterclaim, 2, 3.

PLEADING.

1. A counterclaim in replevin for a specified sum for time lost in endeavors to regain possession of the chattels by rebonding is insufficiently pleaded, as it does not sufficiently appear that the time alleged to have been so spent was necessarily spent for such purpose. *McCarty v. Kepreta*, 395.
2. A demurrer in replevin to a counterclaim for expense, trouble, and work, amounting to a specified time, in trying to regain possession of the chattels, is properly sustained, as it does not appear how the expense was incurred. *McCarty v. Kepreta*, 395.
3. A demurrer in replevin to a counterclaim asking damages for attorney fees in defending and regaining possession of the chattels is properly sustained, being covered by the statute authorizing taxing of the same as costs in lieu of attorney fees. *McCarty v. Kepreta*, 395.

VERDICT AND JUDGMENT.

Ordering new trial on appeal for error in judgment, see Appeal and Error, 53.

4. In the absence of an instruction to find the value of each item separately, or a demand therefor, a verdict in replevin returning the value of the property in the aggregate is not erroneous, under N. D. Rev. Codes, 1905, §§ 7036, 7075. *Smith v. Willoughby*, 1.
5. A plaintiff who has wrongfully taken property in claim and delivery proceedings has an absolute right, under N. D. Rev. Codes 1905, §§ 7075, 7036, to have the judgment against him in the alternative for the return of the property or its value, where he himself was the purchaser of the property at the public auction thereof. *Smith v. Willoughby*, 1.
6. In claim and delivery proceedings, where the proof is uncontradicted that plaintiff, himself, was the purchaser of the property at the public auction thereof, the presumption must be that he was in possession thereof at the time of the trial, so that a judgment for the value alone cannot be

CLAIM AND DELIVERY—continued.

rendered against him, under N. D. Rev. Codes 1905, §§ 7075, 7036, authorizing such judgment, when it is shown that a delivery cannot be had. *Smith v. Willoughby*, 1.

CLOUD ON TITLE.

Jurisdiction in action to quiet title, see *Courts*, 1.

COLLECTIONS.

By bank, see *Banks and Banking*, 7, 8.

COMMERCIAL PAPER. See Bills and Notes.**COMPETITIVE BIDDING.**

For municipal contract, see *Municipal Corporations*, 1–3.

CONCLUSION.

Admissibility of evidence of, see *Evidence*, 19–23.

CONFLICT OF LAWS.

As to procedure on foreclosure of mortgage, see *Mortgages*, 2.

1. The courts will administer the law of the forum governing procedure in a mortgage foreclosure. *Cosgrave v. McAvay*, 343.
2. Notes, the mortgage on foreign land given as security for the notes, and the assignment of the mortgage, are separate contracts of the state where made and to be performed, and are governed by the law and usage of such state. *Cosgrave v. McAvay*, 343.

CONSENT.

Conferring of jurisdiction by, see *Mandamus*, 15.

CONSIDERATION.

Want of, as defense to note, see *Bills and Notes*, 9, 10.

Necessity of, for modification of contract, see *Evidence*, 18.

CONSTITUTIONAL LAW.

Constitutionality of statute making married women liable for family necessities, see Husband and Wife.

Reasonableness of limitation of time to commence action to vacate special assessment, see Limitation of Actions, 1.

CONSTRUCTION.

Of contract, see Contracts, 6, 7.

Of pleading, see Pleading, 2.

CONTEMPT.

Mandamus to require lower court to vacate order dismissing proceedings for, see Mandamus, 1.

CONTEST.

Of county division election, see Counties, 8; Mandamus, 5.

CONTRACTS.

As to bills and notes, see Bills and Notes.

Statute of frauds, see Frauds, Statute of.

Of municipal corporations, see Municipal Corporations, 1-3.

For purchase of land, see Vendor and Purchaser, 1-6, 13-16.

Parol evidence as to written evidence, see Evidence, 10-18.

Injunction against carrying out unlawful contract for erection of courthouse, see Injunction.

1. The written application for insurance does not constitute the contract between an insurance agent as an individual and the applicant, where they have entered into an oral agreement whereby the agent agreed to procure a certain policy for the applicant, in consideration of which the applicant was to transfer notes owned by him, to the agent; but the application is merely one step towards carrying out the deal. *Mulroy v. Jacobson*, 354.

OFFERS AND THEIR ACCEPTANCE.

Specific performance of option contract, see Specific Performance.

See also Vendor and Purchaser, 1, 11, 12.

CONTRACTS—continued.

2. The acceptance of an offer and the subsequent performance of the contract are different matters, and where the acceptance is unconditional, suggestions or demands as to the performance, not qualifying the acceptance, nor rendering it conditional upon compliance therewith, will not invalidate the acceptance. *Horgan v. Russell*, 490.
3. Where an option for the purchase of land gives a specified number of days within which acceptance of the offer must be made, expressly providing that time is of the "essence of this agreement," and in the following paragraph provides that in case of acceptance a specified number of days shall be given in which to make deed and close the deal, without making any similar express provision in this connection, time was of the essence of the agreement as to acceptance, but not as to the closing of the deal, and the optionee, on accepting within the time specified, makes timely offer of performance, upon which he may base a suit for specific performance by offering the same upon the third day after the expiration of the time stipulated. *Horgan v. Russell*, 490.
4. Where the notice of acceptance of the offer contained in an option to purchase land, under which option the optionees have no right to demand an abstract, otherwise constitutes an unconditional acceptance of the offer, the acceptance will not be held conditional because the notice goes on to recite that the optionees "demand an abstract" and deed of the land, where the recital does not amount to a statement that the options accepted upon the condition, or require the optionor to furnish an abstract, but rather is made in reference to what should happen during a period of time which, under the terms, the optionee was to be given in which to examine abstract, make deeds, and close sale, since in such case the demand goes to the question of performance as distinguished from that of acceptance. *Horgan v. Russell*, 490.
5. A notice otherwise constituting a definite and unconditional acceptance of the offer contained in an option to purchase land does not make such acceptance uncertain or conditional by reciting that the optionor is further notified that the optionee is ready, able, and willing to perform "all of the terms thereof at such time and in such manner as may be designated" by the optionor, "according to the terms of said contract," and for that purpose is ready, able, and willing to deposit the price to the optionor's credit "in such time and place and manner as may be designated" by the optionor, and that he will accept or reject this proposition at once, and complete the transaction according to the terms of said contract, since such matter goes to the question of performance as distinguished from that of acceptance, and especially is this true where the terms of the option provide that in case of acceptance a specified time shall be given in which to examine abstract, make deed, and "close sale," thus practically

CONTRACTS—continued.

inviting some suggestion concerning readiness, ability, time or manner of performance. *Horgan v. Russell*, 490.

CONSTRUCTION AND OPERATION.

6. That one under a farming contract with another, by which the latter is to farm the former's land and care for and feed the former's cattle upon the premises, fails to perform a binding stipulation on his part to furnish buildings for the cattle, does not exonerate the other from the duty of using due care in some reasonable way to protect the cattle from extremely cold weather. *Putnam v. Prouty*, 517.
7. One who goes into the possession of the land, cattle, horses, and machinery of another, under a farming contract, by the terms of which the former is to farm the land for a portion of the produce; care for upon the premises the cattle for a portion of them and of their increase; and purchase the horses and machinery; to become the owner thereof when a note given for their purchase price shall have been paid in full with interest, and all the other conditions of the agreement shall have been fulfilled, all property of every description being in the possession of, and owned by the latter till said conditions shall have been fulfilled subject to proper use by the other,—cannot be deprived of the possession of the horses and machinery for his failure to exercise the care due under the contract to prevent the cattle from freezing and starving to death, since his right to the property so to be purchased depends in no way upon the continuance in force of the other portion of the contract. *Putnam v. Prouty*, 517.

RESCISSION OF CONTRACT.

8. The fact that a party, after rescinding a contract, expresses a willingness to permit the other party to go on with the contract, which proposal is ignored, does not destroy the effect of the rescission and reinstate the contract. *Mulroy v. Jacobson*, 354.
9. A party who immediately returns the policy received under a contract by another to procure insurance for him, on the ground that it was not the policy agreed upon, has received no benefits which he must restore, or offer to restore, on his subsequent rescission of the contract. *Mulroy v. Jacobson*, 354.
10. A party agreeing to exchange notes owned by him, for a designated policy of life insurance, has the right, at his election, to rescind the contract after the policy, for which he had transferred the notes to the other party, is mailed to him, and he refuses to accept it because it is not the policy agreed upon. *Mulroy v. Jacobson*, 354.

CONTRIBUTORY NEGLIGENCE.

- In general, see Negligence, 3, 4, 6a, 7.
- On sidewalk, see Municipal Corporations, 7.
- At railroad crossing, see Railroads.
- On street car track, see Street Railroads.

CONVERSION. See Trover and Conversion.

CORPORATIONS.

Municipal corporations, see Municipal Corporations.

COSTS.

Undertaking on appeal for payment of, see Appeal and Error, 14-19.

COUNTERCLAIM. See Set-Off and Counterclaim.

COUNTIES.**ALTERATION AND CREATION OF NEW COUNTIES.**

Admissibility of ballots in evidence, see Evidence, 5, 6.

1. The creation of a new county cannot be accomplished without a strict compliance with the letter and spirit of N. D. Const. § 168, requiring the proposition to be submitted to the electors of the counties affected and to be adopted by a majority of all the votes cast on the proposition. State ex rel. Minehan v. Thompson County Auditor, 273.
2. It is the duty of the canvassing board of a county, under N. D. Rev. Codes 1905, § 673, to compel election precinct officers who have failed to make the returns from, and canvass, their precincts, to do so. State ex rel. Minehan v. Thompson County Auditor, 273.
3. The result of an election may be established by other evidence than the returns, ballots, and election records, where from any cause such record evidence becomes incompetent or unavailable, but not four years after the election. State ex rel. Minehan v. Thompson County Auditor, 273.
4. The oral testimony of election officials, necessitated by their dereliction of duty in making returns of a county division election, would not be admissible four years after the election, and after two intervening elections. State ex rel. Minehan v. Thompson County Auditor, 273.

COUNTIES—continued.

5. The certificate of the canvassing board of a county, showing on its face that it does not include the vote cast in some of the precincts, is not *prima facie* evidence of the result of a county division election as to all the precincts in the county. *State ex rel. Minehan v. Thompson County Auditor*, 273.
6. The presumption that a duty imposed by law has been regularly and duly performed, aided by a stipulation on the trial that all the requirements of the election law were fully complied with other than as set forth in the stipulated facts, will not compel the court to conclude that, notwithstanding the stipulated fact that no returns on a county division proposition were ever made to the board of county canvassers from certain precincts, all ballots cast on this proposition have been canvassed and returned, and to presume that no ballots were cast in such precincts on this proposition. *State ex rel. Minehan v. Thompson County Auditor*, 273.
7. The burden of proof upon a party to establish the facts from which the conclusion that a county division was regularly carried at an election must be drawn is not met by evidence as to returns from, and the vote cast in, all of the precincts in the county, where he stipulates that the proof as offered really covers but part of the precincts. *State ex rel. Minehan v. Thompson County Auditor*, 273.
8. A certificate of a county canvassing board of a county division election, containing the abstract of the vote of a portion only of the precincts of the county, does not compel the county auditor, refusing to certify to the secretary of state that the county division proposition was carried, to resort to a statutory contest to determine the actual result of the election. *State ex rel. Minehan v. Thompson County Auditor*, 273.
9. A new county is not created under the constitutional and statutory provisions relative thereto, where the certificate of the canvassing board shows on its face the omission to canvass some of the precincts of the county, and there were sufficient electors voting on other questions in the omitted precincts that, had they voted against the creation of the new county, the negative votes would have exceeded the affirmative votes. *State ex rel. Minehan v. Thompson County Auditor*, 273.
10. Under N. D. Const. § 168, requiring the submission to the electors of all changes in the boundaries of counties, all doubt as to the result of the election must be resolved against a relator in mandamus seeking to obtain a judicial determination that a new county has been so created. *State ex rel. Minehan v. Thompson County Auditor*, 273.
11. An abstract of the canvassing board of a county, of the vote upon a county division proposition, required under N. D. Rev. Codes 1905, § 651, setting forth that in a specified number, not being all, of the precincts a certain number of votes were cast in favor of, and a certain number against, the

COUNTIES—continued.

proposition, shows on its face that it is incomplete, and but a partial canvass of the whole vote cast in the county on the proposition. *State ex rel. Minehan v. Thompson County Auditor*, 273.

12. It is an abuse of discretion to grant a writ of mandamus to compel a county auditor to certify that a county division proposition was carried, upon proof of the certificate of the canvassing board of the county showing a majority in favor thereof, where further proof shows that the certificate omits the returns from some of the precincts, and it does not appear what was the result of the vote in those precincts. *State ex rel. Minehan v. Thompson County Auditor*, 273.

TAXATION AND ASSESSMENTS; RIGHTS AND REMEDIES OF TAXPAYERS.

Mandamus to compel retransfer to proper fund of interest and penalty on special assessment paid by township, see *Mandamus*, 3.

13. A township against which is levied a special assessment to reimburse for special benefits to highways therein from a drain constructed, and from which by the county treasurer in his capacity, under N. D. Rev. Codes 1905, § 1832, as collector and custodian of the drain fund, is collected, upon the township's making delinquent payment of the assessment, interest and penalty, paid voluntarily at a time when there was no authority in law for its collection, has an interest therein to the extent of a right to have it applied to the purposes for which it was paid and for which the particular drain fund was created, and to prevent its application upon a county courthouse building fund. *State ex rel. Viking Twp. v. Mikkelson*, 175.
14. Interest and penalty paid voluntarily at a time when there was no law authorizing its collection, by a township in making delinquent payment of a special assessment levied against it to reimburse for special benefits accruing to highways therein from a drain constructed, to the county treasurer in his capacity, under N. D. Rev. Codes 1905, § 1832, as amended by Laws 1907, p. 127, as collector and custodian of the drain fund, is paid into that fund, the whole of which is, as between the county and that fund, a trust fund to be applied to the purposes only for which it was created and collected, and the county is the trustee thereof for the purpose of the application thereof to such purposes, but is without legal authority to divert the same to other uses. *State ex rel. Viking Twp. v. Mikkelson*, 175.
15. The provision of N. D. Rev. Codes, 1905, § 1575, that interest and penalty collected on delinquent taxes shall belong to the county, being a general tax provision, has no application to special assessments for drainage purposes; and so, where a special assessment has been levied against a township to reimburse for special benefits accruing to highways therein

COUNTIES—continued.

from a drain constructed, and the county treasurer has in his capacity, under N. D. Rev. Codes 1905, § 1832, as amended by Laws 1907, p. 127, as collector and custodian of that drain fund, collected the assessment and in addition interest and penalty thereon for delinquency in payment, at a time when there was no law for any collection of such interest or penalty, the township paying the same voluntarily, the provision cannot, as between the county and that drain fund, and against the township's action to have such interest and penalty credited to that fund, be invoked to justify the treasurer in having transferred upon the order of the commissioners the item to a county courthouse building fund. *State ex rel. Viking Twp. v. Mikkelsen*, 175.

16. A county treasurer who, collecting in his capacity under N. D. Rev. Codes 1905, § 1832, as amended at page 127 of the Session Laws of 1907, as collector and custodian, drain taxes, from a township, delinquent paying a special assessment to reimburse for special benefits to highways therein from a drain constructed, collects in addition interest and penalty, which, there being at the time no law authorizing any collection of such, are paid voluntarily, and then at the instance of the county transfers such interest and penalty to a county courthouse building fund, cannot, against mandamus proceedings by the township to have the same retransferred to the credit of the drain fund, be heard to question the legality of the collection, since having collected and received it to be credited to the particular drain fund, he must so credit it, and the county is without interest in the collection other than to see that the same is so credited and applied. *State ex rel. Viking Twp. v. Mikkelsen*, 175.
17. Interest and penalty paid voluntarily at a time when there was no law authorizing its collection, by a township in making delinquent payment of a special assessment levied against it to reimburse for special benefits accruing to highways therein from a drain constructed, to the county treasurer in his capacity, under N. D. Rev. Codes 1905, § 1832, as amended by Laws 1907, p. 127, as collector and custodian of the drain fund, is paid as a part of a drain assessment and into that particular drain fund and, as between the county and such fund, must there remain until disbursed for drainage purposes, and is not the property of the county, nor subject to transfer by it from that fund to a county courthouse building fund. *State ex rel. Viking Twp. v. Mikkelsen*, 175.
18. Where a township has paid interest and penalty voluntarily, at a time when there was no law authorizing its collection, in making delinquent payment of an assessment levied against it to reimburse for special benefits accruing to highways therein from a drain constructed, to the county treasurer in his capacity, under N. D. Rev. Codes 1905, § 1832, as amended by Laws 1907, p. 127, as collector and custodian of that drain fund, who then mis-

COUNTIES—continued.

applies, as between the county and such fund, such interest and penalty by transferring it, at the instance of the county, to a county courthouse building fund, such township, being subject to reassessment for any deficiency not met by the collection made, has, in the application of all assessments levied to meet the construction of that drain, an interest which is like that of any ordinary landowner in the drainage district subject to assessment, and extends its right to relief by mandamus proceedings against the treasurer, to have all sums so collected as penalty and interest by whomsoever paid, and so belonging to that particular drain fund, and so diverted therefrom to the county, ascertained in amount and retransferred to the credit of the drain fund. *State ex rel. Viking Twp. v. Mikkelsen*, 175.

RIGHTS AND REMEDIES OF TAXPAYERS.

19. The complaint in an action by residents and taxpayers of a county to enjoin the carrying out of a contract for the erection of a courthouse, which complaint, when fairly and liberally construed, discloses that the contract was void because not authorized by the voters of the county, that the board, in letting the contract, failed to proceed according to law, and that sufficient funds were not on hand, and that no provision was made, as required by law, for raising the necessary funds for the carrying out of the improvement, is not demurrable on the ground that it does not state a cause of action. *McKinnon v. Robinson*, 367.

COUNTY COURTS.

Jurisdiction of, see *Courts*, 1.

COURTHOUSE.

Demurrability of complaint in action to enjoin contract for erection of, see *Counties*, 19.

Right to enjoin unlawful contract for erection of, see *Injunction*.

COURTS.

Justices of the peace, see *Justices of the Peace*.

Functions of, see *Trial*.

Power of parties to confer jurisdiction by consent, see *Mandamus*, 15.

COURTS—continued.

JURISDICTION OF COUNTY COURTS.

1. An action to determine adverse claims and to quiet title to real property, being equitable in its nature, and not for the recovery of money, is not embraced within the provision of N. D. Const. § 111, that county courts of increased jurisdiction shall have concurrent jurisdiction with the district courts in "all civil actions where the amount in controversy" does not exceed a specified amount. *Mead v. First Nat. Bank*, 12.

EXERCISE OF SUPERINTENDING CONTROL.

2. Whether the remedy by appeal is adequate or speedy must be determined by the exercise of the sound discretion of the supreme court, applied to the facts of the case, on an application for the exercise of its superintending control over inferior courts. *State ex rel. Red River Brick Corp. v. District Ct.* 28.
3. The supreme court will not issue, under its superintending power over inferior courts, a writ of mandamus to compel a district court to punish for contempt city officials assessing, in violation of an injunction, land annexed under void proceedings, as the relator has an adequate remedy by appeal, and there is no emergency. *State ex rel. Red River Brick Corp. v. District Ct.* 28.
4. The supreme court should not exercise its power of superintending control over inferior courts, except in case of emergency or exigency, or when made necessary by the lack of other, or adequate or complete, remedy, or when the ends of justice imperatively demand it, as its primary function is the consideration of appeals, and defeated litigants must seek relief by appeal where it is applicable and furnishes adequate and speedy protection to them. *State ex rel. Red River Brick Corp. v. District Ct.* 28.
5. The writ necessary to fit the case, when a proper case arises for the exercise by the supreme court of its superintending control over inferior courts, may take the nature of a command or of a prohibition, or the court may, if found necessary to enable it to determine its character, issue a preliminary writ requiring records to be certified up, the appellation of the writ being wholly immaterial. *State ex rel. Red River Brick Corp. v. District Ct.* 28.
6. The supreme court is given by N. D. Const. §§ 86 and 87, a general superintending control over all inferior courts, and power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other writs as may be necessary to the proper exercise of such control. *State ex rel. Red River Brick Corp. v. District Ct.* 28.

COURTS—continued.

7. The limitation of the issuance by the supreme court of prerogative writs to cases where the sovereignty of the state, its prerogatives, or the liberties of its citizens are involved, or the matter is *publici juris*, is inapplicable to the exercise of its superintending control over inferior courts. *State ex rel. Red River Brick Corp. v. District Ct.* 28.

COVENANTS.

To furnish vendee with abstract and give warranty deed, see Vendor and Purchaser, 2.

1. The covenant by the vendor to furnish an abstract and give a warranty deed, and the covenant by the vendee to pay the purchase price at a designated time, are dependent covenants. *McCulloch v. Bauer*, 109.
2. A vendee has the right to rely upon the vendor's express covenant to furnish an abstract and give a warranty deed, though he has knowledge that the vendor's title is defective, or that he has no title, and such knowledge can in no manner be construed as any waiver by him of the binding force of such covenant. *McCulloch v. Bauer*, 109.

CRIMINAL LAW.

Extradition of criminals, see Executors and Administrators.

Habeas corpus, see Habeas Corpus.

As to indictment, see Indictment and Information.

Various particular crimes, see Homicide; Larceny.

Evidence in prosecution for homicide, see Homicide, 2, 3.

Evidence on prosecution for larceny, see Larceny, 1, 2.

Cross-examination and impeachment of witnesses, see Witnesses.

INSTRUCTIONS.

1. The court is not called upon to instruct the jury on subjects on which no evidence is submitted. *State v. Woods*, 156.

HARMLESS ERROR.

In prosecution for homicide, see Homicide, 5-7.

2. On a trial for larceny of the feeder slats of a threshing machine, it is not prejudicial error to exclude evidence relative to the number and size of feeder slats procured by defendant from another machine for use on his

CRIMINAL LAW—continued.

- machine and to the necessity of cutting a piece off of such slats in order to fit them to his machine. *State v. Schonberg*, 532.
3. The sustaining of an objection to a question, on the cross-examination of a witness for the state, in a criminal prosecution, if erroneous, is not prejudicially so, where substantially the same question has been asked the witness and by him answered without objection from the state. *State v. Moeller*, 165.
 4. Where a witness for the state in a criminal prosecution is asked a question on cross-examination, to which an objection is sustained, and the ruling is upon defendant's appeal held error, the court, on his appeal from a conviction upon the retrial, at which the testimony of the witness was given from the shorthand notes of official reporter taken at the first trial, the witness being out of the jurisdiction, will not hold the testimony improperly admitted, upon the ground that defendant was, by the ruling at the first trial, denied the right fully and fairly to cross-examine the witness, where it appears to the court from its fuller understanding of the witness's testimony that the ruling of the trial court at the first trial was, if erroneous, at all, not prejudicially so. *State v. Moeller*, 165.
 5. An instruction in effect that the jury, in deciding the case, should ignore the arguments of counsel, is prejudicial. *State v. Schonberg*, 532.
 6. An appellate court cannot say that prejudicial error was committed in instructing the jury, when the entire charge and all the evidence is not before the court, and the portions of the charge criticized are not necessarily erroneous, regardless of any other instructions which might have been given, and regardless of the evidence which may have been introduced. *State v. Schonberg*, 532.
 7. The supreme court, when the evidence is not before it on a criminal appeal, will not hold an instruction erroneous, unless it is so under every possible view of the case, and will presume it to be correct under the circumstances and as applied to the evidence, unless abstractly wrong. *State v. Woods*, 156.

CROPPERS' CONTRACTS.

Construction of, see *Contracts*, 6, 7.

Parol evidence of, see *Evidence*, 11.

CROSS-EXAMINATION.

Of witness, see *Witnesses*.

CROSSING.

Contributory negligence at railroad crossing, see *Railroads*.

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DAMAGES.

Extent of recovery by purchaser of note after maturity, see Bills and Notes, 16.

1. A bailee from whom bailed chattels are wrongfully taken can merely recover damages based upon the injury to his special interest, and cannot recover for the full value of the chattels taken, where, before suit by him against the wrongdoer, they are returned by the latter to the possession of the bailors. *Smith v. Willoughby*, 1.
2. The rule which makes market value of personal property the measure of damages in case of its destruction cannot be invoked in the case of the destruction of used or secondhand tools or machinery, such as gang plows, eveners, singletrees, wagons, and running gear, to require the owner thereof, in his action for damages, in testifying as to their value to confine himself to market value, since such used or secondhand articles can hardly be said to have any market value. *Seckerson v. Sinclair*, 625.

DEATH.

Abatement of action by, see Abatement and Revival.

Mode of bringing action by infant for death of mother, see Infants.

- N. D. Rev. Codes 1905, chap. 38, authorizing a recovery for wrongful death, is in derogation of the common law, and one who seeks to recover thereunder must point to a plain provision of the statute authorizing his cause of action. *Willard v. Mohn*, 390.

DEBTOR AND CREDITOR.

Priority of judgment creditor under unrecorded conveyance, see Vendor and Purchaser, 7-10.

DEEDS.

Cancellation of, see Cancellation of Instruments.

DEFAULT.

Judgment by, see Judgment, 2-4.

Right to foreclose mortgage on default in payment of interest, see Mortgages, 2.

DEFENSE.

To foreclosure suit, see Mortgage, 1.

DEFINITION. See Words and Phrases.

DEMURRER.

In general, see Pleading, 3-5.

To counterclaim in replevin, see Claim and Delivery, 2, 3.

To complaint in injunction suit, see Counties, 19.

DEPENDENT COVENANTS. See Covenants, 1.

DEPOSITIONS.

A party served at Grand Forks, North Dakota, with notice that the deposition of an adverse witness is to be taken on the fourth succeeding day at Pontiac, Michigan, is afforded sufficient time to appear and cross-examine, or at any rate is not entitled to a suppression of the deposition on the ground of his having been given insufficient time for the purpose, where he makes no claim that he was in fact prevented from appearing or being represented. *Robertson Lumber Co. v. Swenson*, 134.

DISCHARGE.

On habeas corpus, see Habeas Corpus.

DISCRETION.

Abuse of, see Appeal and Error, 40, 41; Counties, 12.

As to allowance of interest for action in tort, see Interest.

DISMISSAL.

Of appeal, see Appeal and Error, 27-34; Justice of the Peace, 3-8.

Of mandamus proceedings, see Mandamus, 13.

DOCUMENTARY EVIDENCE. See Evidence, 4-9.

DRAINS.

Proper application of interest and penalty on special assessment voluntarily paid to county by township, see Counties, 13-18..

1. Prior to the enactment of N. D. Laws 1911, chap. 125, no authority existed before or in the absence of a sale, for the collection of any interest and

DRAINS—continued.

penalty on special drain assessments. *State ex rel. Viking Twp. v. Mikkelsen*, 175.

2. Under N. D. Rev. Codes 1905, § 1821, as amended by chap. 93, Laws of 1907, providing that a petition for the construction of a drain may be made in writing to the board of drainage commissioners; and that "if among the leading purposes of a proposed drain are benefits to the health, convenience, or welfare of the people of any city or other municipality, the petition shall be signed by a sufficient number of the citizens of such municipality or municipalities to satisfy the board of drain commissioners that there is a public demand for such drain,"—the board has no authority, when a drain is proposed to be established for those purposes to lie entirely in one township, to make an assessment therefor against another township, in the absence of signatures of citizens of the latter township to the petition. *State ex rel. Bale v. Morrison*, 568.

ELECTIONS.

On question as to creation of new county, see *Counties*, 1–12;

Mandamus, 4–7, 11, 12.

Admissibility of ballots, see *Evidence*, 5, 6.

ELEVATORS.

Master's liability for injury to employee, see *Master and Servant*,

3, 7–10.

Assumption of risk by employee on, see *Master and Servant*, 6.

Grain elevators, see *Warehousemen*.

EMPLOYEE. See *Master and Servant*.**ESTOPPEL.**

An appellant who, pending appeal to procure a new trial, files affidavits incidentally showing that his defense was without merit, is not estopped to claim that the affidavits are not a judicial admission of such fact, where the affidavits have in nowise misled the opposing party, nor been acted upon by him, but the court, on its own motion, without considering the merits, summarily dismissed the appeal. *McCarty v. Kepreta*, 395.

EVIDENCE.

Prejudicial error in admission or exclusion of, see *Appeal and Error*, 45–49.

EVIDENCE—continued.

- In prosecution for homicide, see Homicide, 2, 3.
- In prosecution for larceny, see Larceny, 1, 2.
- In mandamus proceedings, see Mandamus, 9-12.
- In action for damages by vendor of land, see Vendor and Purchaser, 13-16.
- As to fires, see Negligence, 5, 6.
- As to incompetency of grantor, see Cancellation of Instruments, 2.
- Evidence admissible under pleading, see Exchange of Property.

PRESUMPTIONS AND BURDEN OF PROOF.

- As to notice of bank officers, see Banks and Banking, 1-6;
Bills and Notes, 4, 6.
 - In claim and delivery, see Claim and Delivery, 6.
 - As to performance of duty in county division election, see Counties, 6.
 - As to regularity of county division election, see Counties, 7.
 - Of ratification of agent's act, see Principal and Agent, 2.
 - As to freedom from contributory negligence, see Railroads, 7.
 - As to contributory negligence on street car track, see Street Railroads, 2.
 - In action for damages by vendor of land, see Vendor and Purchaser, 13.
1. A mere presumption of fact, arising from a presumption of legal duty performed, is overthrown by proof inconsistent with the application of the presumption. *State ex rel. Minehan v. Thompson County Auditor*, 273.
 2. The party holding the affirmative of the issue must assume the burden of proof to establish the essential allegations of his pleadings, that is, to present to the court the fact entitling him to recover. *State ex rel. Minehan v. Thompson County Auditor*, 273.

EVIDENCE OF CONVERSATION BY TELEPHONE.

3. Objection by plaintiff, in an action on a note, to the allowance in evidence of a telephone message alleged to have been received from an agent without proof of his agency and without laying the foundation as to knowledge of his voice, is without merit, where it appears that the receiver of the message mailed to the agent the note in question, payable to his principal, in response to the message, and that the principal afterwards sold the note to plaintiff. *Fleming v. Sherwood*, 144.

EVIDENCE—continued.

DOCUMENTARY EVIDENCE.

4. The introduction by plaintiff, without objection from defendant, of incompetent letters written by the latter to the former regarding a contract between them, does not warrant the court in receiving in evidence incompetent letters written by plaintiff to defendant, though they were replies to defendant's letters. *Mulroy v. Jacobson*, 354.

—BALLOTS.

5. The ballots used in a county division election would not be admissible as evidence four years after the election. *State ex rel. Minehan v. Thompson County Auditor*, 273.
6. Ballots still in existence after the sixty-day period prescribed by statute, during which they must have been kept and were primary evidence, to be admissible must have been kept as required by law. the guards thrown around them must have been preserved, and they must still exist in the same integrity as when cast. *State ex rel. Minchan v. Thompson County Auditor*, 273.

—PHOTOGRAPHS.

7. Great care should be exercised in receiving photographic exhibits showing elevations. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
8. Photographs, if properly verified, may be received in evidence to show locations and conditions. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
9. Photographs of the place of a railroad crossing accident in December, taken in the following June, are admissible, where the conditions remained the same, except for the absence of snow and the removal of one building not necessary to consider in relation to the issues. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.

PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

10. The rules that parol evidence is inadmissible to contradict or vary the terms of a written contract, and that all prior or contemporaneous oral negotiations are merged in such written agreement, have no application to a written application for insurance, which is merely one step in carrying out an oral individual agreement by the agent to procure a certain policy for the applicant. *Mulroy v. Jacobson*, 354.

EVIDENCE—continued.

11. The terms of a stipulation in a written contract, whereby one turns over to another, for a period of three years, lands to be farmed upon shares, together with stock and machinery, that the latter shall at his own expense "feed and care for" the stock during the period for a portion of it and of its increase, are not varied or contradicted by proof of a contemporaneous parol agreement that the former would furnish buildings for housing the stock. *Putnam v. Prouty*, 517.
12. The rule against contradicting or varying by parol evidence the terms of a written contract, embodied in statutory form in N. D. Rev. Codes 1905, § 5333, providing that the execution of a contract in writing supersedes all preceding or accompanying stipulations concerning its matter, does not preclude proof of the existence of any separate oral stipulation or agreement as to any matter on which the written contract is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them. *Putnam v. Prouty*, 517.
13. Proof of the vendee's knowledge at the time of entering into a contract of sale, of apparent defects in the vendor's title, is immaterial and irrelevant in the face of the vendor's covenant to furnish an abstract and to give a warranty deed. *McCulloch v. Bauer*, 109.
14. Conversations between the vendor and vendee, subsequent to the making of a written contract for the sale of land, for the purpose of showing an oral modification of the contract, are inadmissible in an action by the vendor for breach of the contract, where no foundation for proving such modification is laid in the complaint. *McCulloch v. Bauer*, 109.
15. Conversations between the vendor and vendee, subsequent to the making of a written contract for the sale of land, for the purpose of showing an oral modification of the contract, are inadmissible in an action by the vendor for breach of the contract, under N. D. Rev. Codes 1905, § 5382, providing that a written contract cannot be altered except by a contract in writing or an executed oral agreement, and § 5332, prohibiting the modification by a subsequent oral agreement of a contract required by the statute of frauds to be in writing. *McCulloch v. Bauer*, 109.
16. Evidence tending to show a parol agreement by the vendee to accept a warranty deed from the vendor, with existing defects in the title, is inadmissible in an action by the vendor for breach of a contract of sale, as it contravenes the well-settled rule that the terms of a written contract cannot be varied or contradicted by parol. *McCulloch v. Bauer*, 109.
17. In an action by the vendor for the breach of a written contract of sale, in which he covenants to give a warranty deed, it is not error to exclude evidence tending to show a modification of the contract, or a waiver by the

EVIDENCE—continued.

vendee as to its provisions requiring the vendor to furnish a marketable title at the time designated. *McCulloch v. Bauer*, 109.

18. Conversations between the vendor and the vendee, subsequent to the making of a written contract for the sale of land, for the purpose of showing an oral modification of the contract, are inadmissible in an action by the vendor for breach of the contract, where no consideration for such modification is shown. *McCulloch v. Bauer*, 109.

OPINION EVIDENCE.

19. Naked facts, and not conclusions, are stated by a witness who states that he examined the place in question and that "the southeast quarter was not entirely burned over," that "there was indication of a straw pile," that "you could see where the fire had come out of the remains or ashes of the straw pile," that "there was more than one of these straw piles, one flax and one spelt," and that "they were both in ashes." *Seckerson v. Sinclair*, 625.
20. The question upon the trial in an action to recover for injuries by fire, whether the witness carefully followed the traces of fire for the purpose of determining where it originated, since it calls merely for the answer of "Yes" or "No," calls for no conclusion of the witness except as to the word "carefully," and, if erroneous in that respect, is not prejudicially so. *Seckerson v. Sinclair*, 625.
21. The owner of personal property may testify as to its value without any other foundations being laid except as to his ownership and knowledge; he need not qualify as an expert on values. *Seckerson v. Sinclair*, 625.
22. One who resides, and has for nineteen years been engaged in the general carpentering and building business, in a city within 20 miles of a country district, can, without any other showing as to his familiarity with the prices of material and labor for buildings in that district, be permitted to testify as to the general value and cost of building materials and labor in relation to the construction of buildings there. *Seckerson v. Sinclair*, 625.
23. Objection to a hypothetical question, asking what would be the value of a building hypothetically described, upon the mere ground that the description varies from that of the building referred to as given in formerly admitted testimony, should point out the particulars of the variations, where the descriptions, in general complexion and substantially, conform to one another, especially where the variance can be readily pointed out on cross-examination. *Seckerson v. Sinclair*, 625.

WEIGHT AND SUFFICIENCY.

24. The finding of the trial court, in an action on a forfeited bail bond, that the bondsmen did not surrender their principal, is sustained by evidence show-

EVIDENCE—continued.

ing that the bondsmen delivered their principal to the sheriff on a train, according to the request of the state's attorney, without any statement that it was in discharge of the bond. *State v. Banks*, 21.

25. A finding by the jury in claim and delivery proceedings, of damages for the detention of horses, has no basis in the evidence, where the testimony from which the finding is made is to the effect that during a portion of each of certain years the horses were worth so much a day, and the net value of their use for each year or during the entire period is not shown, since it is unjust to show merely their earning capacity for a part of the time, without also showing what would be the cost of feeding and caring for them during the remainder. *Putnam v. Prouty*, 517.

EXCESS LOANS.

Constructive notice to bank president purchasing note given for, see *Banks and Banking*, 5.

EXCHANGE OF PROPERTY.

Under a complaint alleging the ownership and conversion of notes, parol evidence tending to show that a policy of insurance orally agreed to be procured in exchange for the notes did not conform to the written application therefor is admissible, though the complaint does not allege facts showing either fraud or mistake or some ground for rescission. *Mulroy v. Jacobson*, 354.

EXECUTION.**SALE UNDER EXECUTION.**

1. Redemption by the debtor of his property, sold under execution to the judgment creditor, is not a voluntary payment of the debt, which will prevent the recovery of damages accrued from the levy in case of the setting aside on appeal of the judgment. *Murphy v. Casselman*, 336.

EXECUTION AGAINST THE PERSON.

Right to discharge, see *Habeas Corpus*.

2. A body execution may be issued against defendant in an action for seduction of plaintiff's minor daughter, under N. D. Rev Codes 1905, § 6890, authorizing an arrest in an action for "injury to person," and § 7103,

EXECUTION—continued.

authorizing the issuance of an execution against the person in an action in which defendant may be arrested as provided in § 6890. *State ex rel. Nyhus v. Ross*, 586.

EXECUTORS AND ADMINISTRATORS.

Right to amend complaint in action against, see Pleading, 4.

Actions in tort come under the prohibition of N. D. Rev. Codes 1905, § 8161, against actions for money only against administrators. *Willard v. Mohn*, 386.

EXTENSION OF TIME.

For settlement of case, see Appeal and Error, 22.

EXTRADITION.

One charged in a sister state with obtaining money under false pretenses, and found in this state, is not kept from being an extraditable fugitive from justice within the meaning of § 2, art. 4, of the Federal Constitution, and §§ 5278, 5279 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 3597, and § 10293 of the Revised Codes of North Dakota, 1905, by the fact that he left the first state and came here under the expressed permission of the complaining witness that he do so for the purpose of raising the money to make it good, and for that purpose, and not for the purpose of avoiding arrest and punishment. *Re Galbreath*, 582.

FAMILY NECESSARIES.

Liability for, see Husband and Wife.

FELLOW SERVANTS. See Master and Servant, 4, 5.

FINDINGS.

Conclusiveness of, on appeal, see Appeal and Error, 42-44.

FIRES.

Liability for injury by, see Negligence, 1, 2, 5, 6, 8, 9.

FORECLOSURE.

Of mortgage, see Mortgages.

FRAUDS, STATUTE OF.

Parol evidence as to written contract, see Evidence, 10-18.

1. The provision of the statute of frauds with regard to an agreement by its terms not to be performed within a year from the time of the making will be given no application against a party to a contract who had fully performed his part at the time of the making, even though the promise of the other party was not to perform, and could not have been performed, within that time. *Olson v. McQueen*, 212.
2. Where A, B, and C own in common a threshing machine, and A offers to sell his interest to D, but, before completing the sale, according to a prior agreement between the owners that no one of them should sell his interest without the consent of the others, arranges for a meeting between all the parties, and at such meeting conveys his interest at a stated price upon agreement that B, C, and D will do his threshing for two years and credit the halves of such price respectively upon the two threshing bills, the promise of B, C, and D, is an original one, and involves within the meaning of the statute of frauds no promise to answer for the debt, default, or mis-carriage of D. *Olson v. McQueen*, 212.

FUGITIVE FROM JUSTICE. See Extradition.

GOOD FAITH.

Purchaser in good faith, see Bona Fide Purchasers.

Meaning of, see Vendor and Purchaser, 7.

GRAIN ELEVATORS. See Warehousemen.

GROUND FOR REVERSAL. See Appeal and Error, 45-51; Criminal Law, 2-7; Homicide, 5-7.

GUARDIAN AD LITEM.

In action by infant for death of mother, see Infants.

Amending complaint to show that infant is real party, see Pleading, 5.

HABEAS CORPUS.**GROUND FOR DISCHARGE.**

1. That the order under which a judgment defendant is transferred from the

HABEAS CORPUS—continued.

- jail of one county to that of another in terms requires his incarceration in the latter jail for a longer time than the law permits is no ground for his liberation by habeas corpus before such time as by operation of law he is entitled to his liberty. *State ex rel. Nyhus v. Ross*, 586.
2. A judgment defendant incarcerated under a body execution is not entitled to a release upon habeas corpus upon the ground of delay in payments of his board, where it is shown that the demand was received by the creditor on the second day after being mailed, and that payment was received by the sheriff by mail on the fifth day after the receipt of such demand, where from all that appears the remittance may have been mailed within twenty-four hours after its receipt. *State ex rel. Nyhus v. Ross*, 586.
 3. A judgment debtor who is arrested and held in custody under a body execution directing his incarceration in the jail of the wrong county, and is transferred to and committed in the jail of the right county, under order of the court out of which issued the execution, issued at a habeas corpus hearing initiated by such defendant, is not, upon habeas corpus, entitled to release upon the theory that he was released from arrest at such hearing, and is being held solely by virtue of the order there made, because such order uses the words, "the petition is granted for the discharge," where it goes on to state that the court deems the defendant not entitled to a discharge upon the merits, and in terms orders his incarceration in the latter jail, and provides that a copy of the order shall be the commitment to the sheriff of the latter county and his authority for holding the defendant: such language does not constitute a discharge or release, but merely a direction for change of place of incarceration. *State ex rel. Nyhus v. Ross*, 586.
 4. Where a judgment debtor is arrested and held in custody under a body execution directing him to be incarcerated in the jail of the wrong county, the error does not render the execution a nullity, so as to entitle him to release upon habeas corpus upon his being transferred to and committed in the jail of the right county, under order of the court out of which issued the execution, since such an error in such an execution is at most a mere irregularity not going to the jurisdiction, even though the law requiring him to be incarcerated in the jail of the latter county be construed as mandatory. *State ex rel. Nyhus v. Ross*, 586.

HARMLESS ERROR. See Appeal and Error, 45-51; Criminal Law, 2-7; Homicide, 5-7.

HIGHWAYS.

Municipal liability for injury by defects in, see Municipal Corporations, 4-8.

HOMICIDE.**SELF-DEFENSE.**

1. Mere belief that one is in imminent danger of great personal injury from another will not justify him in killing the other, but he must have reasonable ground for such belief. *State v. Woods*, 156.

EVIDENCE.

2. The opinion of a medical expert for the state, in a prosecution for the murder of a girl as the result of producing an abortion upon her, as to the cause of her death, is not to be disregarded because he admits the possibility only that, at the time of an examination of her by him before the time of the alleged injury, at which time according to his testimony he found her well, she might have been carrying germs that caused her death. *State v. Moeller*, 165.
3. Testimony for the state, in a prosecution for the murder of a girl as a result of producing an abortion upon her, that a man alleged by the state to be a conspirator with the accused and the girl in procuring the abortion, and responsible for the pregnancy, came to the town a day before the girl and engaged the room at the hotel where she died; was seen in consultation with the accused; bought for the use of the girl and the accused articles such as distilled water found later in her room; was seen frequently in the room just before her death; was seen carrying from the room the slop jar, which was afterwards found to be bloody; and that the accused sent for this man 60 miles across the country when the girl died,—are admissible to be considered by the jury in case of their finding the existence of the conspiracy. *State v. Moeller*, 165.

INSTRUCTIONS.

4. An instruction in a prosecution for murder of a girl, resulting from producing an abortion upon her, that the jury might consider the evidence of acts of a man alleged by the state to have been a conspirator with the girl and the accused in producing the abortion, and responsible for the pregnancy, in connection with the operation, if the jury should find the conspiracy existed, but if they did not find such, the acts should be disregarded, is proper. *State v. Moeller*, 165.

APPEAL AND ERROR.

5. An appellate court, when the evidence is not before it, will not reverse a con-

HOMICIDE—continued.

viction of manslaughter in the first degree for failure to instruct as to the lesser included offenses. *State v. Woods*, 156.

6. An appellate court will not hold erroneous an instruction as to self-defense, on the ground that it left out of consideration the elements of mitigation and excuse, where there was nothing before it to show that there was any evidence submitted tending in any manner to mitigate or excuse the offense. *State v. Woods*, 156.
7. A conviction for the murder of a girl by producing an abortion upon her will not be reversed on account of remarks of the assistant state's attorney in summing up, wherein he refers to the accused as a "professional abortionist," "Moloch who kills unborn children for the almighty dollar," etc., where the counsel for the accused, because "he did not care to interfere with the argument," made no timely objection, and offered the trial court no opportunity to stop the language or rebuke the counsel, but made the objection after the argument had ceased. *State v. Moeller*, 165.

HUSBAND AND WIFE.

Action for necessities as account state, see *Account Stated*.

Effect of continued possession by wife after unrecorded conveyance to her by her husband, see *Vendor and Purchaser*, 9, 10.

NECESSARIES.

1. N. D. Laws 1907, chap. 136, making a married woman liable for family necessities, does not violate Const. § 213, providing that a woman's property shall not be liable for her husband's debts. *Banner Mercantile Co. v. Hendricks*, 16.
2. The complaint in an action to recover from husband and wife for family necessities, under Laws 1907, chap. 136, making the wife liable therefor, is sufficient without alleging that she has a separate estate, or that the goods were purchased for the use of or consumed by the family, or pleading said statute, where it is alleged that the husband and wife were living together, and that the merchandise sold consisted of household supplies. *Banner Mercantile Co. v. Hendricks*, 16.

HYPOTHETICAL QUESTION. See *Evidence*, 23.**ICE.**

Municipal liability for injury to traveler on highway by, see *Municipal Corporations*, 4-8.

IMPEACHMENT. Of witness, see Witnesses, 2, 3.

IMPRISONMENT.

Right to discharge from, see Habeas Corpus.

INCOMPETENT PERSONS.

Cancellation of deed given by, see Cancellation of Instruments.

INDICTMENT AND INFORMATION.

1. Prosecution by indictment and information are concurrent remedies in the sense that they are of equal dignity, of equal importance, and that under certain circumstances they apply to the same object or offense, but they are not concurrent in the sense that they may be adopted on any offense at any time, or that they exist at the same time or on the same occasion. *State v. Woods*, 156.

AMENDMENT.

2. The reasons for not permitting an amendment of an indictment to be filed in the county to which the venue of an action is changed, *viz*: that the grand jury has jurisdiction only in its own county; is not at all times in attendance upon the court; does not follow the case out of the county; and because its functions cease when it is discharged, which is usually long before the end of the term for which it was called,—do not apply to the amendment of an information. *State v. Woods*, 156.
3. The state's attorney of the county in which a homicide was committed has authority to file an amended information, on leave of court, in the county to which the venue of the action has been changed, under N. D. Rev. Codes 1905, § 9930, requiring the state's attorney or other prosecutor to follow a criminal trial into the county to which it is removed, and giving the court full jurisdiction and authority to hear, try, and determine the case, and to conduct it in all respects as if it had been commenced in such county. *State v. Woods*, 156.
4. After a change of venue on the application of the defendant in a criminal action, granted by reason of prejudice existing in the county wherein the offense is charged to have been committed, the state may, before trial and in the county to which the venue has been changed, file, on leave of court, an amended information charging the same offense that was charged, or attempted to be charged, in the original information. *State v. Woods*, 156.

INFANTS.

Amending complaint in action by guardian *ad litem* so as to show that infant is real party, see Pleading, 5.

An action brought under N. D. Rev. Codes 1905, chap. 38, in favor of an infant, for damages for the death of its mother by wrongful act, should be brought in the name of the infant by its guardian *ad litem*, and not in the name of the guardian himself. *Willard v. Mohn*, 390.

INFORMATION. See Indictment and Information.

INJUNCTION.

Against carrying out of contract for erection of courthouse, see Counties, 20.

Mandamus to compel court to punish violation of, see Mandamus, 1.

1. Residents and taxpayers of a county have the right to maintain a suit, in behalf of themselves and all other residents and taxpayers who may elect to join with them, to enjoin the carrying out of an unlawful contract for the erection of a new courthouse. *McKinnon v. Robinson*, 367.
2. Residents and taxpayers of a county cannot be held to have lost their right to injunctive relief against the carrying out of an unlawful contract for the erection of a courthouse, by the commencement of its erection prior to the institution of the suit, where it does not appear how far the work has progressed, and it cannot be inferred that the contract has been substantially completed, and it does not appear what portion, if any, of the contract price has been paid by the county. *McKinnon v. Robinson*, 367.

INSANE PERSONS.

Cancellation of deed given by, see Cancellation of Instruments.

INSOLVENCY.

Of bank making collection, see Banks and Banking, 7, 8.

INSTRUCTION.

In criminal prosecution, see Criminal Law, 1.

In action for injury by fire, see Negligence, 8, 9.

Prejudicial error in, see Appeal and Error, 50, 51.

Criminal Law, 5-7; Homicide, 6.

INTEREST.

On special assessments for drains, see Counties, 13-18; Drains, 1; Mandamus, 3.

To instruct in a tort action that interest shall be awarded in case of a finding for plaintiff is erroneous, since the statutes and decisions of the state all hold that in such actions the awarding of such interest shall be discretionary with the jury. *Seckerson v. Sinclair*, 625.

INTERVENTION.

Refusal to permit, as abuse of discretion, see Appeal and Error, 41.
Certiorari to review order permitting, see Certiorari.

JAIL.

Right to discharge from, see Habeas Corpus.

JOINT LIABILITY.

Instruction as to, see Negligence, 8.

JUDGMENT.

In claim and delivery, see Claim and Delivery, 5, 6.
On appeal, see Appeal and Error, 52, 53.
Reviewability of order denying motion for judgment on pleadings, see Appeal and Error, 37.

JUDGMENT NOTWITHSTANDING VERDICT.

1. A judgment of dismissal notwithstanding a verdict for plaintiff should be granted where the evidence precludes any right of plaintiff to recover. *McVeety v. Harvey Mercantile Co.* 245.

By DEFAULT.

Appearance preventing, see Appearance.

2. Where, in an action against a railway company, the complaint and summons are duly served on its station agent, the service is then complete, and it is not necessary to the entry of a valid and regular judgment by default that the papers be received at the head office of the company. *Getchell v. Great Northern R. Co.* 487.
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JUDGMENT—continued.

—OPENING OR SETTING ASIDE DEFAULT.

Refusal to open, as abuse of discretion, see Appeal and Error, 40.

3. Upon an application, under N. D. Rev. Codes 1905, § 6884, to have reopened a judgment by default, regularly entered against it, upon the ground that the station agent of the company neglected to forward the papers to the head office of the company, allegations of the affidavit of the attorney for the company, that he has been furnished with the records of the claim department upon the matter, and after examining them he has advised the company that it is not liable for the damages asked in the complaint, do not constitute a sufficient affidavit of merits, since they do not show that the claim department truthfully stated all the facts of the case to the attorney, nor do they state that the company has a good defense on the merits, but merely that the attorney has advised the company that it has. *Getchell v. Great Northern R. Co.* 487.
4. If a railway company wishes to have a judgment by default against it reopened upon the ground that the station agent, duly served with summons and complaint, neglected to forward the papers to the head office of the company, it must make its application under N. D. Rev. Codes 1905, § 6884, and make and file a good and sufficient affidavit of merits, and it is not relieved from the necessity of such affidavit upon the theory that the judgment was void for want of service through failure of the agent to forward the papers, since regular service upon him is complete service upon the company. *Getchell v. Great Northern R. Co.* 487.

JUDICIAL SALE.

Sale under execution, see Execution, 1.

JURISDICTION.

Power of parties to confer, by consent, see Mandamus, 15.

JUSTICE OF THE PEACE.

Appealability of order refusing to reverse justice's judgment, see Appeal and Error, 2, 3.

PLEADINGS IN JUSTICE'S COURT.

1. The requirement of N. D. Rev. Codes 1905, § 8392, that pleadings in a justice court must be in writing and verified in an action to recover damages for injury to real property, is not jurisdictional. *Whitney v. Ritz*, 576.

JUSTICE OF THE PEACE—continued.

2. The intent of the requirement of N. D. Rev. Codes, § 8392, that pleadings in a justice court be in writing and verified, in an action to recover damages for an injury to real property, was to prevent the raising of sham or frivolous issues as to boundaries or title to real property in a justice court, and where in such an action neither title nor boundary are brought in question, the defendant, by participating in all the steps of the trial without objecting to the fact that plaintiff's pleadings are oral, until after appeal to the district court, waives the requirement. *Whitney v. Ritz*, 576.

DISMISSAL OF APPEAL.

Matters considered on appeal from order denying motion to dismiss appeal from justices of the peace, see Appeal and Error, 39.

3. A litigant presenting a motion to dismiss an appeal from the justice to the district court must prove, by affidavit or from the face of the records, the irregularities of which he complains. *Willard v. Mohn*, 386.
4. In the absence of statute, it is not essential to the validity of a dismissal by the district court of an appeal from a justice's court, for nonprosecution by the appellant through nonappearance, that he have notice of the motion. *Saunders v. Harris*, 236.
5. An order dismissing an appeal from a justice's judgment, for nonprosecution, because of appellant's failure to appear during the term at which the case has been set on peremptory call for trial, and on its being reached more than a week after the commencement of the term, will not be vacated on a mere claim that the court had no power to dismiss without any excuse or explanation of his default. *Saunders v. Harris*, 236.
6. The district court has power to dismiss an appeal from a justice's judgment, for nonprosecution, on defendant's failure to appear during the term at which the case has been set on peremptory call for trial, nearly a year after entry of the judgment appealed from, and on its being reached more than a week after the commencement of the term, even though the justice has failed, after payment therefor, to transmit the record on appeal. *Saunders v. Harris*, 236.
7. On a motion to dismiss an appeal from the justice to the district court, where the respondent serves notice on the appellant that the merits of the law applicable to the specifications of error enumerated in the notice of appeal may be considered, it is the right and duty of the district court to try the issue of law arising upon a demurrer interposed in the justice court. *Willard v. Mohn*, 386.
8. A motion to dismiss an appeal from the justice to the district court, on the ground that the copy of the undertaking on appeal served did not have the

JUSTICE OF THE PEACE—continued.

names of the sureties mentioned in the body of the undertaking, and did not contain any affidavit of the qualifications of said sureties, was properly denied, where it appeared that there was no proof otherwise than the mere statement of the attorney that the copy was the one that had been actually served, and the original undertaking on file was duly signed and verified by the sureties, and contained an admission of service. *Willard v. Mohn*, 386.

LACHES.

In commencing injunction suit to enjoin carrying out unlawful contract, see *Injunction*, 2.

LARCENY.

Cross-examination of witness in prosecution for, see *Witnesses*.

EVIDENCE.

1. On a trial for larceny of feeder slats of a threshing machine, it is not error to refuse to allow defendant's brother to narrate his conversation with defendant on the evening before the larceny, presumably offered for the purpose of showing that defendant expressed to his brother his intention of going to a named place to procure slats, some of the slats on defendant's machine having been broken, from a certain man's feeder, on the ground that such testimony amounted to merely self-serving declarations and hearsay statements of defendant, and that any expressed intent by defendant to his brother of his purpose that night was both incompetent and immaterial. *State v. Schonberg*, 532.
2. It is not error to refuse to receive in evidence a box of feeder slats which had been removed from defendant's machine, for the purpose of proving that they had to be cut off at the ends in order to fit his machine, and that his feeder was not the same as that of the machine from which he was accused of stealing them, as such evidence is wholly incompetent, irrelevant, and immaterial, especially where no proper foundation was laid for its admission, no connection having been shown between such slats and those alleged to have been stolen. *State v. Schonberg*, 532.

QUESTIONS FOR JURY.

3. The possession of stolen property, recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found, and whether such inference should be drawn is a fact exclusively for the jury. *State v. Schonberg*, 532.

LAST CLEAR CHANCE. See Negligence, 4; Street Railroads, 2.

LETTERS.

Admissibility of, in evidence, see Evidence, 4.

Prejudicial error in the admission of, in evidence, see Appeal and Error, 48.

LICENSE.

One who grows his own fruit and ships it into this state and sells it at retail from a car placed upon a side track is not a merchant, and therefore not a transient merchant within the meaning of chap. 201, Laws 1911, requiring transient merchants to pay a license to the state and a local license to any town, village, or city within which they may do business, although it defines a transient merchant as one who engages in the "vending or selling" of merchandise at any place in the state temporarily, and who does not intend to become and who does not become a "permanent merchant" at such place. *State v. Fleming*, 593.

LIENS.

Mechanics' liens, see Mechanics' Liens.

LIMITATION OF ACTIONS.

Sufficiency of title of limitation statute, see Statutes.

1. The six months limitation put by § 2790, Rev. Codes 1905, § 155 of chap. 62, Session Laws of 1905, upon the time within which to commence actions to vacate special assessments, to run from date of their approval by the city council, is not an unreasonable limitation. *McKone v. Fargo*, 53.
2. The limitation imposed in general terms by § 2790, Rev. Codes 1905, § 155 of chap. 62, Session Laws of 1905, upon the time within which to commence actions to set aside special assessments, is not, by the specification in the title of the act that it is to provide for the limitation of actions to vacate special assessments made prior to the passage of the act, made inapplicable in the case of assessments made after the passage of the act. *McKone v. Fargo*, 53.

LOWEST BIDDER.

Letting municipal contract to, see Municipal Corporations, 1-3.

MANDAMUS.

Refusal to permit intervention in, as abuse of discretion, see Appeal and Error, 41.

Issuance of, under superintending power of supreme court, see Courts, 3.

SUBJECTS AND PURPOSES OF RELIEF.

To compel approval of grain elevator bonds, see Warehousemen.

1. The supreme court will not issue a writ of mandamus commanding a district court to vacate its order dismissing contempt proceedings, and to punish the violators of its injunction, for the purpose of asserting and maintaining the respect due to the judgments of the courts, as charges of contempt in trial courts are at least primarily determinable in the forum where or against which they are alleged to have been committed. *State ex rel. Red River Brick Corp. v. District Ct.* 28.
2. Mandamus cannot be brought by the surety on a bond to compel the acceptance or continued approval of such instrument, since, if proper at all, the proceeding should be brought by the principal, and not by the surety; and the same is true of the writ of prohibition when sought to be obtained to prevent a board, which is vested with the power of approval, from disapproving bonds. *State ex rel. Dakota Trust Co. v. Stutsman*, 68.
3. Mandamus is a proper remedy by which a township which has paid interest and penalty voluntarily, at a time when there was no law authorizing its collection, in making delinquent payment levied against it to reimburse for special benefits accruing to highways therein from a drain constructed, to the county treasurer in his capacity, under N. D. Rev. Codes 1905, § 1832, as amended by Laws 1907, p. 127, of the Session Laws of 1907, as collector and custodian of the drain fund, may compel him, on his having, at the instance of the county, transferred such interest and penalty to a county courthouse building fund, to retransfer the same to the credit of the drain fund. *State ex rel. Viking Twp. v. Mikkelsen*, 175.
4. A return or certificate of election, of the canvassing board of a county, in a county division election, on its face based upon an incomplete canvass of the official precinct returns, does not prevent the determination by mandamus of the result of the election and of the legal consequences of the return. *State ex rel. Minehan v. Thompson County Auditor*, 273.

ANSWER.

5. An answer in a mandamus proceeding to compel a county auditor to certify to the secretary of state that a county division proposition was carried,

MANDAMUS—continued.

denying the facts alleged by the relator, and supplemented with matters purely of defense to the writ, does not create a contest, and for the court to examine and consider and give proper force to the evidence, consisting of the certificate of the canvassing board and stipulated facts, is not to contest an election in mandamus. *State ex rel. Minehan v. Thompson County Auditor*, 273.

6. It is proper for a county auditor, against whom mandamus proceedings are brought to compel him to certify that a county division proposition was carried, to answer, on behalf of himself and parties interested, and therein put in issue the allegation in the petition and alternative writ that the returns from all the precincts in the county were made and by the county canvassing board canvassed, with the result thereby determined in favor of such county division, and allege that the certificate of the county canvassing board is incomplete, and not a finding of the result of the election on all the precincts, and that the county division proposition did not receive a majority of all the votes cast on such proposition. *State ex rel. Minehan v. Thompson County Auditor*, 273.
7. A statement in an answer, that out of a certain number of voters in a county a certain number of votes were cast for a proposition and a certain number against it, is not an admission that the sum of the votes for and against were all the votes cast on the proposition, where such statement is made in connection with the defense that, granting that a majority of the votes cast on the proposition were for it, it would not receive the required majority of all the votes cast on the election, and where the answer further alleges that the entire vote on the proposition was never returned to or canvassed by the county board of canvassers. *State ex rel. Minehan v. Thompson County Auditor*, 273.
8. In a mandamus proceeding to compel a city treasurer to make the certificate required by N. D. Rev. Codes 1905, § 2577, that the bonds of the city are legally issued and within the debt limit of the city, an issue or defense is not pertinent nor germane which is based upon the alleged illegality of a contract in payment of which the proceeds of the bonds may afterwards be applied. *State ex rel. Fargo v. Mitchell*, 196.

EVIDENCE.

9. The granting of a writ of mandamus upon proof by the relator of a prima facie case is a matter not of strict legal right, but discretionary, and the court can exact further proof. *State ex rel. Minehan v. Thompson County Auditor*, 273.
10. The burden of proof is on the relator in mandamus to make out a prima facie case by proof of the necessary averments of the alternative writ and peti-

MANDAMUS—continued.

- tion by the preponderance of the evidence. *State ex rel. Minehan v. Thompson County Auditor*, 273.
11. In mandamus proceedings to compel a county auditor to certify that a county division proposition was carried, where it is alleged and denied that returns were made from all the precincts of the county, showing a majority in favor of the proposition, stipulated facts as to the omission of some of the precincts from the returns, and as to the number of electors voting in the omitted precincts, may be considered as evidence. *State ex rel. Minehan v. Thompson County Auditor*, 273.
 12. The vital, essential fact necessary for the relator, in a proceeding for mandamus to compel a county auditor to certify to the secretary of state that a county division proposition was carried, to establish is that the canvassing board ascertained and determined the number of votes cast throughout the county on the proposition, and that the result showed a majority in favor thereof. *State ex rel. Minehan v. Thompson County Auditor*, 273.

DISMISSAL OF WRIT.

13. Mandamus proceedings to compel a county auditor to certify to the secretary of state that a majority of all votes cast in the county at an election on county division was for the creation of a named county are properly dismissed on failure of proof, and should not be remanded for further proof four years after the election. *State ex rel. Minehan v. Thompson County Auditor*, 273.

APPEAL AND ERROR.

14. Under N. D. Rev. Codes 1905, §§ 6854, 6858, in a mandamus proceeding against a county treasurer to compel him to retransfer to a drain fund an item transferred by him, at the instance of the county, to a county courthouse building fund, the treasurer, by joining issue and going to trial upon the merits without having raised the point, waives any right he may have had to urge that the nonjoinder of the county was such a defect of parties as would preclude a judgment on the merits. *State ex rel. Viking Twp. v. Mikkelsen*, 175.
15. A stipulation by the parties in prohibition proceedings, brought by bonding company to restrain the board of railroad commissioners from an alleged usurpation of power in questioning the sufficiency of bonds upon which the company was surety, given by grain elevators, under § 2247, Rev. Codes 1905, for the protection of the patrons of such warehouses, the bonds having expired by lapse of time before the appeal is heard, that the case can proceed in the supreme court as if it had been upon a petition for a writ of

MANDAMUS—continued.

mandamus to compel the board to approve new bonds of the company to take the place of those which had expired, cannot be carried out by such court, since for the court to do so would be for it to assert an original mandamus jurisdiction, not under the Constitution granted to it. *State ex rel. Dakota Trust Co. v. Stutsman*, 68.

MARKETABLE TITLE.

Parol evidence as to vendee's waiver of requirement for marketable title at specified date, see *Evidence*, 17.

As essential under covenant to furnish vendee with abstract and to give warranty deed, see *Vendor and Purchaser*, 2.

MARKET VALUE.

As measure of damages, see *Damages*, 2.

MARRIED WOMEN. See Husband and Wife.**MASTER AND SERVANT.****MASTER'S DUTY AS TO PLACE OF WORK.**

Presentation of question for review in trial court, see *Appeal and Error*, 8.

1. It is the duty of the master to furnish his servants with reasonably safe premises on which to work and a reasonably safe theory and method of work. *Wyldes v. Patterson*, 218.
2. The rule that the master shall furnish his servants with reasonably safe premises and appliances, and that the master himself shall not be negligent, is just as much a part of the implied contract of employment as is the agreement that the master shall not be liable for the negligence of a fellow servant. *Wyldes v. Patterson*, 218.
3. It is the duty of a builder to his employees, even if he cannot furnish an absolutely safe elevator system, to see that the elevators are so managed that if his instructions are carried out the plan of operation will be as nearly safe as will be reasonably possible, and if a system of signals is necessary, it is incumbent upon him to provide a proper system, and see that it shall be generally understood by employees liable to be affected by it. *Wyldes v. Patterson*, 218.

MASTER AND SERVANT—continued.

FELLOW SERVANTS.

4. The extension of the fellow-servant rule to persons in a common employment, who cannot control the actions of each other, is justified only upon the theory of an implied contract entered into at the time of the employment, and not upon the theory of the opportunity of self-protection. *Wylde v. Patterson*, 218.
5. A builder cannot sustain a verdict directed in his favor in an action for an injury to a common laborer, who was thrown onto a temporary freight elevator, while placing a wheelbarrow thereon, by its being suddenly and without warning lowered, and who was precipitated to the ground by the breaking of the wire cable due to the force of the fall or the sudden stoppage of the elevator by the engineer, on the ground that the accident was caused by the negligence of a fellow servant, where it appears that the engine house was located so that the engineer could not see the elevator landing, and no adequate system of signals was provided for the operation of the elevator. *Wylde v. Patterson*, 218.

RISKS ASSUMED BY SERVANT.

6. A laborer injured by the sudden lowering of an elevator used in the construction of a building did not assume, as matter of law, the risk of his employer failing to acquaint all of his employees with the signals agreed upon for the operation of the elevator. *Wylde v. Patterson*, 218.

QUESTIONS FOR JURY.

7. It is for the jury to say whether a reasonably adequate system of signals for the operation of an elevator was provided, where the evidence is clear that no definite system was arranged, and the system was not generally known. *Wylde v. Patterson*, 218.
8. It is for the jury to say whether the method of raising materials from the street to the roof of a building by employees placing wheelbarrows on, and withdrawing them from, a temporary elevator in the street operated by an inclosed steam engine, requires a system of signals in order to render it reasonably safe. *Wylde v. Patterson*, 218.
9. It is for the jury to say whether an injury to a laborer during the construction of a building, caused by his being drawn unto the lift while placing a wheelbarrow thereon, of a temporary elevator adjoining the building, operated by an inclosed steam engine, by such lift being suddenly and without warning lowered, was the proximate result of the builder's negligence

MASTER AND SERVANT—continued.

in not providing a proper system of signals for the operation of the elevator. *Wylde v. Patterson*, 218.

10. On the trial of an action for an injury to an employee resulting from the sudden lowering, without warning, of the elevator used in constructing a building, the question whether the engineer could have seen the plaintiff far enough back from the elevator landing to operate the machinery with a reasonable degree of safety should have been submitted to the jury, where all of the defendant's witnesses testified that the plaintiff could have been so seen, but the physical facts absolutely contradicted their testimony. *Wylde v. Patterson*, 218.

MATURITY.

Of note, see Bills and Notes, 14.

MECHANICS' LIENS.**VERIFICATION OF STATEMENT.**

1. Failure of a materialman to sign the affidavit of verification appended to his mechanics' lien statement does not make the lien a nullity for want of proper verification, where he duly signs the statement, and in fact duly makes oath to the truth of the facts stated in the affidavit. *Robertson Lumber Co. v. Swenson*, 134.

EFFECT OF ERRORS OR DEFECTS IN CLAIM OR STATEMENT.

2. A materialman furnishing material to the amount of some \$900, and who by chap. 158, Laws of 1909, is required, as a condition of being entitled to a mechanics' lien therefor, to "keep an itemized account thereof separate and apart from all other items of account against the purchaser," is not, by the provision, deprived of his lien, where he keeps an itemized account in good faith against the purchaser, by the fact that through unintentional mistake or clerical error there is included therein an item of some \$10 representing material furnished the purchaser to be used elsewhere than upon the property sought to be covered by the lien. *Robertson Lumber Co. v. Swenson*, 134.
3. The requirement of § 6240, Rev. Codes 1905, that the mechanics' lien claimant file with the clerk of the district court "a just and true account of the demand due him after allowing all credits," does not operate to make the lien a nullity on account of the errors in the filing, where the itemized account shows total debts of \$940.22 and total credits of \$101.70, which is

MECHANICS' LIENS—continued.

correct except for the including, and addition in, of a debit of \$10.83, included through clerical error, and contains a mistake of \$100 in favor of the lien claimant in the subtraction of the total credits from the total debits, and the results of both errors naturally find their way into the statement. *Robertson Lumber Co. v. Swenson*, 134.

ON SEPARATE LOTS OR BUILDINGS.

4. The rule which, under § 6237, Rev. Codes 1905, making provision for the filing of a mechanics' lien for labor and materials furnished "for construction or repair of any work of internal improvement or for the erecting, alteration, or repair of any buildings, or other structures upon land," and § 6238, permitted the filing of a valid single lien against two or more buildings and the tract of land upon which they stand, for labor or material furnished under a single contract, is not changed by chapter 158, Laws of 1909, which amends § 6237, substituting the words "any building or other structure" for the corresponding plural words, and adding the provision that "no person furnishing material . . . for any of the purposes aforesaid shall be entitled to a lien, . . . unless he shall keep an itemized account thereof, separate and apart from all other items of account against the purchaser." *Robertson Lumber Co. v. Swenson*, 134.
5. The materialman who, under an entire contract, furnishes to the owner of four city lots situated side by side so as to form a single rectangle, material for two dwellings to be built respectively upon two alternate lots of the four, may, under the mechanics' lien statute, file a valid lien upon both buildings and the entire land, since the four lots should be treated as a single tract, or at any rate, under the provisions of § 6238, Rev. Codes 1905, it is proper, in view of the construction of the buildings under a single contract, to file a lien upon both buildings and the lots upon which they stand, and the unoccupied lots will be deemed respectively appurtenant to the occupied lots within the meaning of the statute. *Robertson Lumber Co. v. Swenson*, 134.

MERCHANTS.

Who are, see Licenses; Words and Phrases.

MISNOMER.

In designating pleading, see Vendor and Purchaser, 6.

MODIFICATION OF CONTRACT.

Parol evidence of, see Evidence, 14-17.

MOOT QUESTION.

Decision on appeal, see Appeal and Error, 1.

MORTGAGES.**PAYMENT TO MORTGAGEE AFTER ASSIGNMENT.**

1. Payment in full, before maturity, by the mortgagor to the mortgagee, after, and without actual knowledge of, an assignment, recorded in a foreign state where the land is situated, by the mortgagee of the mortgage and negotiable notes secured thereby, does not discharge the mortgage debt, under a statute of such state providing that the record of an assignment shall not be deemed notice so as to invalidate any payment to the mortgagee, and hence cannot constitute a defense to the foreclosure of the mortgage by the assignee in the state where the land is located, under the statute of which state payment, to discharge the mortgage debt, must be made to the holder of the notes. *Cosgrave v. McAvay*, 343.

FORECLOSURE.

Law governing procedure in, see Conflict of Laws.

See also *supra*, 1.

2. Foreclosure can be had for the full amount, less rebated interest, upon the mortgagor's default in payment of interest, though the principal debt is not due, when authorized under the procedure of the forum, the state where the land is located, though not authorized under the procedure of the state, where the mortgage was made and is payable. *Cosgrave v. McAvay*, 343.

MOTIONS.

To make pleading more certain, see Pleading, 7.

MUNICIPAL CORPORATIONS.

Defense to mandamus to compel issuance of certificate that municipal bonds are legally issued, see Mandamus, 8.

CONTRACTS.

1. N. D. Pol. Code 1905, art. 18, chap. 30, providing for competitive bidding and the prior estimate of probable cost in the case of certain municipal contracts, does not apply to a contract for the erection of a water filtration plant. *Price v. Fargo*, 440.

MUNICIPAL CORPORATIONS—continued.

2. A municipal contract not required by law to be let under competitive bidding need not be let to the lowest bidder, though bids are requested, and, therefore, a taxpayer cannot have the contract set aside because awarded to a higher bidder, without proof of fraud. *Price v. Fargo*, 440.
3. Municipal contracts need not be let under competitive bidding, in the absence of charter or statutory requirement thereof, but in such cases the corporate authorities are only required to act in good faith and to the best interests of the municipality. *Price v. Fargo*, 440.

DEFECTS OR OBSTRUCTIONS IN STREETS.

4. A city may be held liable in an action for damages where the evidence of at least some of the witnesses, which is believed by the jury, shows that a portion of a sidewalk has remained covered with ice and snow during a whole winter, and such ice and snow has been allowed to thaw and freeze and accumulate during such time, and no effort has been made by the city either to remove it or cause the same to be removed, or to sprinkle it with sand or other substance in order to render it less dangerous, and the evidence also shows that such ice and snow were trampled into ruts, mounds, humps, and hillocks by the pedestrians during a thaw, and frozen in such condition, and that after a snowstorm which later fell and largely hid the same, plaintiff slipped and fell thereon. *Jackson v. Grand Forks*, 601.
5. In an action against a city for injuries received by slipping and falling upon a sidewalk covered with ice and snow, introduction by the plaintiff of the charter of the city, giving it power to require the owner or occupant of any premises to keep the sidewalks in front of and along the same free from snow or other obstruction, and ordinances which provide that the owners and occupants of the land shall clear the sidewalks of all accumulations of snow and ice within ten hours after the same have fallen, is not objectionable on the ground of incompetency, irrelevancy, or immateriality, the court being justified in assuming that such evidence is introduced, not for the purpose of prejudicing the jury and making them believe that the owner or occupant would be ultimately liable, but for the purpose of showing an assumption of control by the city, and its construction of its duty in relation to the sidewalks in question, as well as the right of the plaintiff to rely upon such assumption. *Jackson v. Grand Forks*, 601.
6. The plaintiff in an action against a city for injuries received by slipping and falling upon a sidewalk covered with ice and snow need not specially plead the charter of the city, which gives it the power to require the owner or occupant of any premises to keep the sidewalks in front of and along the same free from snow or other obstruction, or the ordinances of the city, which provide that the owners or occupants of the land shall clear the

MUNICIPAL CORPORATIONS—continued.

sidewalks of all accumulations of ice and snow within ten hours after it has fallen or accumulated under liability to a fine, in order to introduce such laws and ordinances in evidence to show assumption of control by the city of the sidewalks and its construction of its duty in relation thereto and the right of plaintiff to rely upon such assumption. *Jackson v. Grand Forks*, 601.

7. Contributory negligence is not established as matter of law, in the case of one injured by slipping and falling upon a city sidewalk covered with ice and snow, by the fact that he went upon the sidewalk with knowledge of its condition, when he might have taken passage outside the sidewalk on either side where there was freedom from ice and snow. *Jackson v. Grand Forks*, 601.
8. Notice to the city is sufficiently shown, in an action for injuries received by slipping and falling upon a sidewalk covered with ice and snow, by proof that they had been allowed to accumulate there during the whole winter, without effort by the city to remove the same or render the place less dangerous to pedestrians. *Jackson v. Grand Forks*, 601.

NECESSARIES.

Action to recover for, as an account stated, see *Account Stated*.
Married women's liability for, see *Husband and Wife*.

NEGLIGENCE.

Of master, see *Master and Servant*.

Of municipality, see *Municipal Corporations*, 4-8.

FIRES.

Evidence as to, see *infra*, 5, 6.

Instruction in action for injury by, see *infra*, 8, 9.

1. One who discovers fire upon his premises is, although he did not set it, under a duty to exercise ordinary care to prevent its spreading. *Seckerson v. Sinclair*, 625.
2. Setting fire to a straw stack which is in the midst of stubble, and which in turn sets fire to the stubble, is setting fire to the stubble itself, so far as concerns the civil liability for damages, irrespective of negligence or malice, imposed by § 2061, Rev. Codes 1905, upon persons setting fire to "any grass or stubble lands" in the month of March. *Seckerson v. Sinclair*, 625.

NEGLIGENCE—continued.

CONTRIBUTORY NEGLIGENCE.

Questions for jury as to, see *infra*, 6a, 7.

On sidewalk, see *Municipal Corporations*, 7.

At railroad crossing, see *Railroads*.

On street car track, see *Street Railroads*.

3. No recovery can be had where an injury is due to the negligence of both parties. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.

INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

On street car track, see *Street Railroads*, 2.

4. The doctrine of discovered peril or of last clear chance may be urged by the plaintiff in a personal injury case, under a general allegation of negligence in the complaint, contributory negligence being an affirmative defense to be alleged and proved by the defendant. *Welch v. Fargo & M. Street R. Co.* 463.

EVIDENCE AS TO FIRES.

5. Testimony in an action for damages for injury by fire, that the reason the witness did not investigate the origin of the fire sooner than he did was because he was tired out from fighting the fire for over a day, is not immaterial, since it tends to show good faith on the part of the witness. *Seckerson v. Sinclair*, 625.
6. In an action to recover damages for injuries occasioned by a fire alleged in one count of the complaint to have been negligently set by defendant, and in another to have been negligently allowed to spread from his land to plaintiff's, it is not error in the trial court to refuse to exclude evidence under the complaint, on a motion made upon the trial, on the ground that the complaint "nowhere described any land belonging to the defendant upon which it is alleged that fire escaped or spread." *Seckerson v. Sinclair*, 625.

QUESTIONS FOR JURY.

- 6a. The question of negligence, whether it be of a defendant or the alleged contributory negligence of the plaintiff, is primarily and generally a question

NEGLIGENCE—continued.

of fact for the jury; it becomes one of law, authorizing the withdrawal thereof from the jury, only when but one conclusion can be drawn from the undisputed facts. *Jackson v. Grand Forks*, 601.

7. Where there is a substantial conflict in the evidence, negligence and contributory negligence are ultimate questions of fact for the jury, and not of law for the court; where, therefore, a special verdict is submitted in a personal injury case, it is not only proper, but necessary, that questions involving such ultimate facts should be submitted and answered. *Welch v. Fargo & M. Street R. Co.* 463.

INSTRUCTION IN ACTION FOR INJURY BY FIRE.

8. An instruction, in an action for recovery for property destroyed by fire, in effect that if the fire which burned plaintiffs' property originated from a third source, the plaintiffs cannot recover, even though the fire so originated may have joined the fire for which defendant was responsible, is properly refused defendant, since it ignores the legal principle that when the wrongs of two persons jointly contribute to an injury, both are liable. *Seckerson v. Sinclair*, 625.
9. An instruction in an action for destruction of property by fire, that if the defendant set fire to a certain flax straw stack in the midst of a certain stubble field, such act was in the eyes of the law the act of setting fire to the stubble, is not objectionable upon the score that the jury might be misled into inferring therefrom that any setting of fire to the stack was setting it to the stubble, where a little later in the instruction the court charges that the first important question for decision by the jury is whether the fire in the stack was the proximate cause of the fire which destroyed the property, and that it is a question of fact for determination by the jury whether the fire from the stack spread therefrom to the stubble field and thence to the property. *Seckerson v. Sinclair*, 625.

NEGOTIABILITY.

Of note, see Bills and Notes, 1.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.**NEW COUNTIES.**

Creation of, see Counties, 1-12; Mandamus, 4-7, 11, 12.

NEW TRIAL.

Grant of, by appellate court, see Appeal and Error, 53.

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NOTICE.

- To bank officer or agent, see Banks and Banking, 1-6; Bills and Notes, 3-11.
- Of acceptance of offer, see Contracts, 4; Vendor and Purchaser, 1.
- Of motion to dismiss appeal for nonprosecution, see Justices of the Peace, 4.
- To municipality of dangerous condition of sidewalk, see Municipal Corporations, 8.
- From possession of land, see Vendor and Purchaser, 9, 10.

OFFER AND ACCEPTANCE. See Contracts, 2-5.

OPINION EVIDENCE. See Evidence, 19-23.

OPTION. See Contracts, 2-5; Specific Performance; Vendor and Purchaser, 1, 11, 12.

PARENT AND CHILD.

- As to infants generally, see Infants.

PAROL EVIDENCE. See Evidence, 10-18.

PARTIES.

- Refusal to permit intervention as abuse of discretion, see Appeal and Error, 41.
- Certiorari to review order permitting intervention, see Certiorari.
- To action to enjoin carrying out unlawful contract, see Injunction, 1.

PAYMENT.

- Of mortgage, see Mortgages, 1.

PENALTY.

- On special assessments for drains, see Counties, 13-18; Drains 1; Mandamus, 3.

PERFORMANCE.

Specific performance, see **Specific Performance**.

Of contract for purchase of land, see **Vendor and Purchaser**, 2-6.

PERSONAL REPRESENTATIVES. See **Executors and Administrators**.**PETITION.**

For construction of drains, see **Drains**, 2.

PHOTOGRAPHS.

Admissibility of, in evidence, see **Evidence**, 7-9.

PLEADING.

Reviewability of order denying motion for judgment on the pleadings, see **Appeal and Error**, 37.

Evidence admissible under, see **Exchange of Property**.

Sufficiency of complaint in action on note, see **Bills and Notes**, 15.

In action to cancel deed, see **Cancellation of Instruments**.

In claim and delivery, see **Claim and Delivery**, 1-3.

In justices' courts, see **Justices of the Peace**, 1, 2.

In mandamus to compel certification of county division proposition, see **Mandamus**, 6, 7.

1. Merely the ultimate facts constituting a cause of action need be alleged in the complaint. *Mulroy v. Jacobson*, 354.

CONSTRUCTION.

2. When a pleading is only attacked by motion or objection to the introduction of evidence on the trial, it will be construed more liberally in favor of the pleader than when the attack is made by demurrer. *Christofferson v. Wee*, 506.

DEMURRER.

To counterclaim in action for claim and delivery, see **Claim and Delivery**, 2, 3.

PLEADING—continued.

3. The objection that facts pleaded in an answer intended to set up a counterclaim do not constitute a proper counterclaim in the action can only be raised by demurrer where the subject-matter properly pleaded might have constituted a valid counterclaim. *Christofferson v. Wee*, 506.

AMENDED AND SUPPLEMENTAL PLEADINGS.

4. It is not error, on sustaining a demurrer to an action against an administrator for damage done by his intestate to a building and the furniture therein, to refuse to allow the complaint to be amended to show an implied contract to pay for the goods destroyed, as such amendment would change the cause of action and would be prohibited. *Willard v. Mohn*, 386.
5. Though an action, brought under N. D. Rev. Codes 1905, chap. 38, in favor of an infant for damages for the death of its mother by wrongful act, be entitled in the name of the guardian *ad litem* himself instead of in the name of the infant, and be thereby objectionable upon demurrer as not stating a cause of action in favor of the guardian, the trial court should allow amendment to show that the infant is the real plaintiff, where the complaint shows that the action was in fact being brought for the benefit of the infant, and that the defect in the title was due to the incorrect use of language by the pleader. *Willard v. Mohn*, 390.
6. A mere misnomer in designating a pleading as an amended instead of a supplemental pleading has no effect where the substantial rights of the parties are not affected, and an additional pleading may be treated as supplemental even though designated as an amended pleading, particularly where it was served by permission of the court, was received and retained without objection by the other party. *Christofferson v. Wee*, 506.

MAKING MORE DEFINITE AND CERTAIN.

7. Where a pleading states the main facts necessary, but through omitting to state some details is rendered to some extent uncertain, the remedy of the other party is by motion to make more definite and certain, or a demand for a bill of particulars, and when he does not avail himself of either of these remedies for more than ten months after the service of the pleading or until a motion for judgment for lack of a reply, his right to object on grounds going to the incompleteness of the pleading is waived. *Christofferson v. Wee*, 506.

POSSESSION.

Adverse possession, *see* Adverse Possession.

Notice from, in rights in real estate, *see* Vendor and Purchaser, 9, 10.

PREJUDICIAL ERROR. See Appeal and Error, 45-51; Criminal Law, 2-7; Homicide, 5-7.

PREROGATIVE WRITS.

Issuance of, under exercise of superintending control, see Courts, 2-7.

PRESIDENT.

Presumption as to knowledge of bank president, see Banks and Banking, 1-6; Bills and Notes, 4, 6.

PRESUMPTIONS. See Evidence, 1, 2.

PRINCIPAL AND AGENT.

Authority of auctioneer, see Auctions and Auctioneers.

Bank as agent for collecting draft, see Banks and Banking, 7, 8.

RATIFICATION.

1. One cannot accept the benefits of an agent's transaction and repudiate its obligations. *Fleming v. Sherwood*, 144.
2. The ratification of an agent's transaction by acceptance of its benefits may be avoided by showing that such acceptance was made without knowledge of the material facts, but the burden of showing such lack of knowledge is upon the principal, and not upon the party dealing with the agent. *Fleming v. Sherwood*, 144.

PRINCIPAL AND SURETY.

Right of surety to bring mandamus to compel acceptance of bond, see Mandamus, 2.

PROCESS.

Sufficiency of service to permit judgment by default, see Judgment, 2-4.

PROHIBITION.

To compel approval of grain elevator bonds, see Warehousemen.

By surety to compel acceptance of bond, see Mandamus, 2.

PROXIMATE CAUSE.

Of injury by fire, instruction as to, see Negligence, 8.

PUBLIC CONTRACTS.

Contracts of municipality, see Municipal Corporations, 1-3.

QUESTIONS FOR JURY.

As to negligence and contributory negligence, see Negligence, 6a, 7.

As to master's liability for injury to servant, see Master and Servant, 7-10.

QUIETING TITLE.

Jurisdiction of county court in action for, see Courts, 1.

RAILROAD COMMISSIONERS.

Right to compel approval of grain elevator bonds by, see Warehousemen.

RAILROADS.

Street railroads, see Street Railroads.

CONTRIBUTORY NEGLIGENCE AT CROSSINGS.

Harmless error in excluding evidence as to giving of crossing signal, see Appeal and Error, 49.

1. The rule requiring a traveler to look and listen at a railroad crossing must be emphasized rather than relaxed, where there are two tracks, rendering it possible for trains to approach from each direction, or to pass each other. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
2. The only diversion of attention excusing the failure to look and listen for an approaching train at a railroad crossing is where the attention is so irresistibly forced to something else as to deprive a traveler of the opportunity to look and listen. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
3. The fact that the attention of a traveler, killed by a train coming from the east, appears to have been diverted by a train standing near a depot located a short distance west of the crossing, does not take the case out of the general rule making it contributory negligence to fail to look in both directions for trains. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.

RAILROADS—continued.

4. Contributory negligence is conclusively established by evidence that the exercise of the ordinary precautions of looking and listening and making an intelligent use of one's faculties to inform oneself as to the approach of a train were neglected, when the exercise of such precautions would have avoided the accident. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
5. A person approaching a railroad crossing is not excused by weather conditions from the exercise of ordinary care, even though they are such as to render it difficult to observe or hear an approaching train, as the greater danger requires greater caution to constitute ordinary care. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
6. A driver about to cross a public railroad crossing in the country is charged with knowledge that it is a dangerous place, and is bound to assume that cars are coming, and must vigilantly use his senses of sight and hearing, and do all that ordinary care and prudence would dictate, to avoid injury, having in view all the surrounding circumstances, whether or not any signal is given by an approaching train. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
7. No inference arising from the instinct of self-preservation is applicable in favor of a person killed by a train, where all the evidence shows that he was not in the exercise of ordinary care, and could have seen and heard the train had he looked and listened. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.
8. A verdict is properly directed for defendant, where it appears that plaintiff's husband, who was killed at a crossing by a train coming from the east at about 10 miles per hour, was driving at a slow walk, with his coat collar turned up over his ears, along a highway from which, for a distance of over 277 feet before reaching the tracks, a train approaching from the east could be seen for nearly a mile, though a little snow was falling and blowing, during the passage over which distance he was looking steadily toward the northwest at a train standing near a depot west of the crossing, and made no effort to ascertain the approach of the train from the east. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40.

RATIFICATION.

Of agent's acts, see *Principal and Agent*.

REAL PROPERTY.

Mechanics' liens on, see *Mechanics' Liens*.

Sale of, see *Vendor and Purchaser*.

RECORDS.

On appeal, see **Appeal and Error**, 22-25.

Rights under unrecorded conveyance, see **Vendor and Purchaser**, 7, 8.

REDEMPTION.

From execution sale, see **Execution**, 1.

RELEASE.

On habeas corpus, see **Habeas Corpus**.

REPLEVIN. See **Claim and Delivery**.

RESCISSION.

Of contracts, see **Contracts**, 8-10.

REVERSIBLE ERROR. See **Appeal and Error**, 45-51, **Criminal Law**, 2-7; **Homicide**, 5-7.

REVIEW.

By appellate court, see **Appeal and Error**, 37-51.

By certiorari, see **Certiorari**.

SALE.

By auctioneer, see **Auctions and Auctioneers**.

Warranty by seller of note, see **Bills and Notes**, 13, 15.

Under execution, see **Execution**, 1.

SAVING QUESTIONS FOR REVIEW. See **Appeal and Error**, 5-11.

SEDUCTION.

Right to body execution in action for, see **Execution**, 2.

SELF-DEFENSE. See **Homicide**, 1.

SEPARABLE CONTRACTS. See **Contracts**, 7.

SERVICE.

Sufficiency of service of complaint and summons to permit judgment by default, see Judgment, 2-4.

SET-OFF AND COUNTERCLAIM.

Sufficiency of pleading setting up counterclaim, see Claim and Delivery, 1-3.

Proper mode of objection to sufficiency of pleading of counterclaim, see Pleading, 3.

1. Where one sues as assignee of a claim for threshing originally held by himself and two others, the defendant may set up as a counterclaim an agreement by all three of the original claimants to do such threshing in consideration of the transfer by defendant to one of the claimants of his interest in the threshing machine. *Olson v. McQueen*, 212.
2. A defendant in replevin may counterclaim for damages for deprivation of the use of the chattels for a short time from the wrongful taking under claim and delivery proceedings until rebonding. *McCarty v. Kepreta*, 395.
3. The chattels replevied are the subject-matter of an action in replevin, and damages for their wrongful detention are "connected with the subject of the action," within the meaning of N. D. Rev. Codes 1905, § 6860, relative to counterclaims, and as also contemplated by § 7036, concerning the form of verdict to be returned in claim and delivery proceedings. *McCarthy v. Kepreta*, 395.
4. Attempted counterclaims, in an action upon promissory notes by the payee against the maker, setting up that they were given for the purchase price of real estate sold defendant by plaintiff upon agreement that the notes should be surrendered upon the return of the conveyance if the register of deeds would not record it, and that the plaintiff represented that he would hold the notes by way of earnest or pledge for the return and cancelation of the conveyance in case the same should not be recorded; refusal of the register to record it; offer by the defendant to return the conveyance for cancelation; and refusal by the plaintiff to surrender the notes,—fall within paragraph 1 of N. D. Rev. Codes 1905, § 6860, defining a counterclaim as arising out of "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action," rather than in paragraph 2, allowing as counterclaim in an action on contract "any other cause of action arising also on contract and existing at the commencement of the action," and hence it does not follow that the act set up must have been done or contracted to be done before the commencement of the action. *Christoffer-son v. Wee*, 506.

SIDEWALK.

Municipal liability for injury to traveler by ice or snow, *see* Municipal Corporations, 4-8.

SNOW.

Municipal liability for injury to traveler on highway by, *see* Municipal Corporations, 4-8.

SPECIAL ASSESSMENTS.

For drains, *see* Counties, 13-18; Drains; Mandamus, 3.

Limitation of action to set aside, *see* Limitation of Actions.

SPECIFIC PERFORMANCE.**AGAINST WHOM.**

1. Specific performance may be maintained against one who purchases lands with full knowledge of an outstanding, unaccepted, but unexpired, irrevocable option previously granted by the seller in favor of a third person, by such third person on his making timely acceptance of the option. *Horgan v. Russell*, 490.
2. The right of one who duly accepts the offer contained in an option for the purchase of land to maintain specific performance against a third party who has bought the land from the optionor with full knowledge of the outstanding, unaccepted option is not defeated by the fact that he makes his tender by depositing subject to the order of the original optionor and owner, where he serves notices thereof upon both the optionor and the third person, reciting that the deposit is to complete the contract and as payment for the title. *Horgan v. Russell*, 490.

CONTRACTS ENFORCEABLE.

3. The executory contract arising from the unqualified and unconditional acceptance of an option to purchase land is as specifically enforceable in equity as would be an ordinary contract embodying the same terms and subscribed by the same persons. *Horgan v. Russell*, 490.
4. The rights of an optionee who has accepted an option for the purchase of land constitute an interest therein enforceable in equity, although the optionor has, before acceptance, transferred title to a third person, who accepted title with notice of the option. *Horgan v. Russell*, 490.

STATUTE OF FRAUDS. See Frauds, Statute of.

STATUTES.

TITLES OF ACTS.

The limitation of time within which to commence actions to vacate special assessments, made after the passage of the act, imposed by § 155 of chap. 62 of the Session Laws of 1905, § 2790, Rev. Codes 1905, does not contravene § 61 of the Constitution, as being without the scope of the title of the law, since it falls within the scope of the same in so far as it reads, "An Act for the Organization and Government of Cities," and the rest, reading "and to Provide for the Limitation of Actions to Vacate Assessments Heretofore Made," constitutes a subtitle, not restrictive of the first part. *McKone v. Fargo*, 53. (On rehearing.)

STAY.

During appeal, see Appeal and Error, 20, 21.

STIPULATION.

As to compliance with requirements of law in county division election, see Counties, 6.

A stipulation on a trial must be taken not only as proof of the facts stipulated, but as a judicial admission of the truth of the paragraph of the answer pleading such facts. *State ex rel. Minehan v. Thompson County Auditor*, 273.

STREET RAILROADS.

CONTRIBUTORY NEGLIGENCE.

1. A hack driver who, having driven along a street car track to where it turns at right angles at a street intersection, looks back some 150 feet to a point between which and himself he sees no car, and then turns and drives on alongside the track some 480 feet, will not be held guilty of such contributory negligence as to preclude recovery as matter of law in then turning, suddenly and without having again looked back, across the track immediately in front of, and so as to be injured by, an overtaking car, where there is evidence that, during practically all of such 480 foot journey, the left wheels of his vehicle were within a few inches of the right rail of the track and

STREET RAILROADS—continued.

within the range of the overhang of the car, since such evidence tends to show that he would have been struck whether he turned to cross or not, and that he did not move from a position of safety to one of peril immediately before the accident. *Welch v. Fargo & M. Street R. Co.* 463.

2. Contributory negligence will not be presumed as matter of law, but the doctrine of last clear chance will be held to apply, where a hack driver having driven along within a short distance of, and parallel to, a street railway track, and within the track of the car, though not of the rail, is overtaken and run down by a rapidly approaching car, and the evidence shows that, though he started to turn across the track just before the accident, he would have been run down whether he had so turned or not, and that the motorman could have seen him during all the time he was on the street and in the track of the car, and that when first turning upon such street and while about 480 feet from the place of collision, he turned and looked back for an approaching car and saw none, but did not look again, though he listened for approaching cars. *Welch v. Fargo & M. Street R. Co.* 463.

SUPERINTENDING CONTROL.

Of supreme court, see Courts, 2-7.

SUPERSEDEAS. See Appeal and Error, 20, 21.

SUPERVISORY JURISDICTION.

Of supreme court, see Courts 2-9.

SUPREME COURT.

Exercise of superintending control by, see Courts, 2-7.

TELEPHONE CONVERSATION.

Evidence of, see Evidence, 3.

TENANCY IN COMMON.

Adverse possession by, see Adverse Possession.

TIME.

For acceptance of option, see Contracts, 3.

TITLE.

Parol evidence of purchaser's knowledge of defects in vendor's title, see Evidence, 13.

Of statutes, see Statutes.

TORT.

Abatement of action in, see Abatement and Revival.

Discretion as to allowance in action for, see Interest.

TOWNS.

Proper application of interest and penalty voluntarily paid by township to county, see Counties, 13-18; Mandamus, 3.

TRANSFER.

Of bill or note, see Bills and Notes, 2-16.

TRANSIENT MERCHANTS.

Who are, see Licenses.

TRIAL.

Instructions in criminal prosecution, see Criminal Law, 1.

Instructions in action for injury by fire, see Negligence, 8, 9.

Prejudicial error in instructions, see Appeal and Error, 50, 51; Criminal Law, 5-7; Homicide, 6.

Question for jury on prosecution for larceny, see Larceny, 3.

Question for jury as to master's liability for injury to employee, see Master and Servant, 7-10.

Stipulation on, see Stipulation.

The function of a court is not to sit as an umpire between counsel, but to see that justice is ultimately done to the litigants, and that the administration of the law itself may be reasonable, and not just subject for criticism. *Burger v. Sinclair*, 315.

TROVER AND CONVERSION.

A conversion of notes is shown by proof that a contract was entered into whereby defendant agreed to procure for plaintiff in exchange for the notes owned

TROVER AND CONVERSION—continued.

by plaintiff, a paid-up policy of insurance, that defendant mailed plaintiff a straight life policy, which he refused to accept, and that plaintiff notified defendant that he rescinded the contract and demanded the notes back, which demand was refused. *Mulroy v. Jacobson*, 354.

UNCERTAINTY.

In pleading, see Pleading, 7.

UNDERTAKING.

On appeal, see Appeal and Error, 12-21; Justices of the Peace, 8.

VALUE.

Admissibility of evidence as to, see Evidence, 21, 22.

Market value as measure of damages, see Damages, 2.

VENDOR AND PURCHASER.

Covenants of vendor, see Covenants.

Parol evidence as to contract for purchase of land, see Evidence, 13-18.

OPTIONS AND EXERCISE THEREOF.

Acceptance of offer for purchase of land, see Contracts, 2-5.

Specific performance of option contract, see Specific Performance.

1. An acceptance of an option to purchase real estate, where the land covered thereby has been, pending acceptance and during the period stipulated within which acceptance might be made, transferred to a third party with full notice of such option outstanding and unaccepted, may be made by serving notice of acceptance upon the optionor, the owner, giving the option, and thereupon the rights of the acceptor, optionee, relate back and attach as of the date of the option, and render the intervening rights acquired with notice subject to all rights of the optionee. *Horgan v. Russell*, 490.

PERFORMANCE OF CONTRACT.

2. A covenant by a vendor to furnish the vendee with abstract for property sold, and to give him a warranty deed for the same, requires the vendor to convey a marketable title. *McCulloch v. Bauer*, 109.

VENDOR AND PURCHASER—continued.

3. One may contract to deliver title to land even though he does not have it, so long as he is a mere volunteer and is acting in good faith. *McVeety v. Harvey Mercantile Co.* 245.
4. The promisee's right to the promisor's covenants of warranty, where one contracts to convey by his warranty deed to another the land of a third person, is a valuable property right, that must be given as required by the contract, unless expressly waived. *McVeety v. Harvey Mercantile Co.* 245.
5. One who contracts to convey to another by good and sufficient warranty deed the land of a third person must, to perform, be able to convey it by his own warranty deed, under N. D. Rev. Codes 1905, § 5401, providing that "an agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass title to the property." *McVeety v. Harvey Mercantile Co.* 245.
6. One who has contracted to purchase from another, by the latter's warranty deed, the land of a third person, upon refusing to perform upon tender by the third party of his deed, does not, by failing to demand the deed of the second party instead of the one tendered, waive his right against such second party to insist that such second party deed as grantor to such first party as grantee, or that the title should come through such second party. *McVeety v. Harvey Mercantile Co.* 245.

BONA FIDE PURCHASERS.

7. The words "in good faith" in N. D. Rev. Codes 1905, § 5038, providing that an unrecorded conveyance shall be void as against a subsequent purchaser in good faith, or as against a subsequent judgment, apply to judgment creditors as well as to subsequent purchasers. *Ildvedsen v. First State Bank*, 227.
8. The rights of a woman under an unrecorded deed from her husband of his interest in land held by them as tenants in common is inferior to the rights, under N. D. Rev. Codes 1905, § 5038, providing that an unrecorded conveyance shall be void as against a subsequent judgment creditor in good faith, of a subsequent judgment creditor of the husband, without actual or constructive notice of said prior unrecorded deed. *Ildvedsen v. First State Bank*, 227.

—NOTICE.

9. The continued possession in the same manner by a married woman of premises, the record title to which is in the names of herself and husband as tenants in common, is not constructive notice to a subsequent judgment creditor of her rights under a prior unrecorded deed from her husband of his interest in said premises. *Ildvedsen v. First State Bank*, 227.

VENDOR AND PURCHASER—continued.

10. A subsequent attachment and judgment creditor of a husband is not put on inquiry as to the rights of the wife under an unrecorded deed, executed by him, on the date of a decree of divorce against him, of his interest in land held by them in common, by the fact that one of the attorneys for the judgment creditor in the attachment suit was the attorney for the wife for a short time in the divorce action, that the judgment creditor knew that the husband was out of possession of the land, because the notice of the levy of the attachment could not be made on him, and was made on his wife as the person in possession, and that such attorney knew that the husband was about to change his residence from the county permanently, as he swore to such fact in the attachment affidavit. *Ildvedsen v. First State Bank*, 227.
11. A purchaser of land, with full knowledge of an outstanding and unaccepted, but unexpired, irrevocable option in favor of a third person, takes subject to the right of such third person to accept the option. *Horgan v. Russell*, 490.
12. One who purchases land from the owner, with full knowledge of an outstanding and unaccepted, but unexpired, irrevocable option thereon given by the owner to a third person, cannot, as against a suit for specific performance by the optionee, based upon his due acceptance of the option, be heard to assert ignorance of an agreement between the optionor and the optionee that in case of acceptance by the optionee, performance of the contract might be made by him by payment of the excess of the named purchase price above a mortgage lien upon the land and assumption of the mortgage, since such purchaser was bound to know the contractual rights of the parties under the option. *Horgan v. Russell*, 490.

EVIDENCE IN ACTION BY VENDOR.

13. A vendor of land, to recover for breach of the contract, must establish, by competent proof, that, prior to the commencement of the action, he was ready, able, and willing to fully perform on his part, though he had been informed by the vendee of his inability to carry out the contract on his part. *McCulloch v. Bauer*, 109.
14. One who has contracted to convey land by his warranty deed to another makes no proof of his ability to perform by proving that the promisee could have received title from a third person of the land agreed to be conveyed. *McVeety v. Harvey Mercantile Co.* 245.
15. One who, having agreed to convey by his warranty deed to another the land of a third person, fails, in his action for damages against the purchaser for nonperformance, to prove his own ability to have performed by failing to prove his ability to give his own warranty deed, and proving merely the tender of the third person's deed to the defendant, so fails to establish any

VENDOR AND PURCHASER—continued.

cause of action as to make immaterial the default of the defendant in the performance of any act precedent to his right to delivery of the deed, since such default can neither cure nor affect the plaintiff's inability to have performed. *McVeety v. Harvey Mercantile Co.* 245.

16. Under N. D. Rev. Codes 1905, § 5253, providing that "an offer of performance must be free from any conditions which the creditor is not bound on his part to perform," where one has contracted to convey by his warranty deed to another the land of a third person, proof of the offer of the third party to convey to the second cannot constitute proof of the ability of the first to perform, as the tender of the deed of the third party cannot constitute compliance with the promise of the first party to deliver his own deed. *McVeety v. Harvey Mercantile Co.* 245.

VENUE.

Amendment of indictment or information after change of, see
Indictment and Information, 2-4.

VERDICT.

Judgment notwithstanding, see Judgment, 1.
In replevin, see Claim and Delivery, 4.

VERIFICATION.

Of mechanics' lien statement, see Mechanics' Liens, 1.

VOLUNTEER.

In contract to deliver title to land, see Vendor and Purchaser, 3.

WAIVER.

Of error on appeal, see Mandamus, 14.
Of right to require that other party to land contract be grantor
in deed, see Vendor and Purchaser, 1-6, 13-16.

WANT OF CONSIDERATION.

As defense to note, see Bills and Notes, 9, 10.

WAREHOUSEMEN.

SUPERVISION BY PUBLIC OFFICERS.

Decision on appeal because matter of public interest is involved,
see Appeal and Error, 1.

1. The mere fact that a surety company has been licensed by the insurance commissioners to do business within the state does not authorize such company to compel the approval of its grain elevator bonds by the board of railroad commissioners, if they are dissatisfied with the business habits or conduct of the surety, or for any other similar reason believe the bonds insufficient. *State ex rel. Dakota Trust Co. v. Stutsman*, 68.
2. The board of railroad commissioners acts in a quasi-judicial capacity, when, for the purpose of approving or disapproving the grain elevator bonds, required by § 2247, Rev. Codes 1905, to be filed with them, they pass upon the business reliability, methods, and good faith of the bonding companies, under the requirement of that section, that the sureties be approved by the railroad commissioners, and the provision of § 2242, as amended by chapter 230 of the Laws of 1909, giving the board power "to investigate all complaints of fraud or oppression in the grain trade of this state, and correct the same;" and the exercise of their legitimate discretion in such matters cannot be controlled by mandamus or prohibition. *State ex rel. Dakota Trust Co. v. Stutsman*, 68.
3. The board of railroad commissioners may, under § 2247, Rev. Codes 1905, which requires operators of grain elevators to file with the board bonds running to the state with good and sufficient sureties to be approved by such commissioners, and conditioned for the faithful performance of their duties as public warehousemen, and under § 2242, as amended by chapter 230 of the Laws of 1909, which gives the board power to "investigate all complaints of fraud or oppression in the grain trade in this state and correct the same," examine into the sufficiency of such bonds from the standpoint of the general business conduct and reliability of the sureties, as well as of the form of the bonds. *State ex rel. Dakota Trust Co. v. Stutsman*, 68.
4. The board of railroad commissioners, in passing upon the sufficiency of bonds furnished by the elevator companies, or the necessity of requiring new bonds, under § 2247, Rev. Codes 1905, requiring operators of grain elevators to file with such board a bond running to the state "with good and sufficient sureties to be approved by such commissioners," and under § 2242, as amended by chapter 230 of the Laws of 1909, which, among other things, gives the board power to investigate all complaints of fraud or oppression in the grain trade and correct the same, has jurisdiction over the elevator companies rather than over the sureties or bonding companies, so that it

WAREHOUSEMEN—continued.

has no right, in the case of a controversy between the ticket holders of an insolvent elevator company and the bonding company, to seek to force a settlement satisfactory to the board by ordering the bonding company to appear before it, and show cause why the commission should not cancel the bonds of the company because of its failure to effect such settlement, but it may inquire into the transaction for the purpose of satisfying itself as to the business reliability of the bonding company, and, if dissatisfied with the good faith or business methods of the bonding company, require other bonds to be given by the elevator companies. *State ex rel. Dakota Trust Co. v. Stutsman*, 68.

WARRANTY.

By auctioneer, see Auctions and Auctioneers.

By seller of note, see Bills and Notes, 13, 15.

WITNESSES.

Competency of witness to give opinion, see Evidence, 19–23.

CROSS-EXAMINATION.

1. On a trial for larceny of feeder slats of a threshing machine, the question asked the owner, a witness for the state, on cross-examination, "Is it not a fact you can run a feeder without having the slats so close?"—is immaterial, and not proper cross-examination. *State v. Schonberg*, 532.

IMPEACHMENT OF WITNESS.

2. A prior statement of a witness, in order to be provable for the purpose of impeachment, must be, in some degree, contradictory to or inconsistent with his testimony on direct examination. *State v. Schonberg*, 532.
3. The question as to what he testified to at the preliminary examination, for the purpose of laying a foundation for impeaching a witness on a criminal trial, is properly excluded, when such question is not germane to any testimony given by the witness on direct examination. *State v. Schonberg*, 532.

WORDS AND PHRASES. See also Licenses.

A merchant is one who buys to sell, or buys and sells, goods or merchandise in a shop or store. *State v. Fleming*, 593.

WRIT.

Sufficiency of service to permit judgment by default, see Judgment, 2–4.

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